No. 88-192

(6)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MCKESSON CORPORATION,

Petitioner,

v.

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

1. Under what circumstances may a state that enacts a tax that is unconstitutional under the Commerce Clause refuse to grant an injured taxpayer any refund of the collected taxes?

LIST OF PARTIES

The parties to the proceedings below were the petitioner McKesson Corporation ("McKesson"), the respondents Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida (collectively, "the State"), and intervenors Jacquin-Florida Distilling Company, Inc. and Todhunter International, Inc.

The respondents before this Court include the Division of Alcoholic Beverages and Tobacco, Department of Business Regulation and Office of the Comptroller, State of Florida.

McKesson's updated Rule 28.1 list is attached to this brief as McKesson Appendix 1a ("M.A." 1a) .

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OPINIONS BELOW

The Supreme Court of Florida's final decree and opinion is reported at 524 So. 2d 1000 (1988), and is printed at Joint Appendix ("J.A.") 414.

The Florida circuit court's order, which has not been reported, is printed at J.A. 261.

JURISDICTION

The Supreme Court of Florida entered its final decree on February 18, 1988, and denied McKesson's timely motion for rehearing on May 2, 1988. McKesson's motion for rehearing is printed at J.A. 431. The order denying McKesson's motion and the court's mandate are printed at J.A. 448-50.

McKesson invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action involves the United States Constitution's Commerce Clause, U.S. CONST. art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The action also involves sections 564.06 and 565.12, Florida Statutes (1985), and section 215.26, Florida Statutes (1985). The Florida statutory provisions are printed at M.A. 7a-16a, 23a-24a.

STATEMENT OF THE CASE

McKesson in this action seeks a refund of taxes that McKesson paid under unconstitutional Florida tax statutes. The Florida Supreme Court held that the Florida tax statutes violated the Commerce Clause. The Florida court, however, rendered its decision prospective only and refused to permit McKesson to seek any refund of the taxes that McKesson paid under the unconstitutional scheme.

The Florida Products Exemption

Before this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), declaring a Hawaii liquor tax exemption for local products unconstitutional under the Commerce Clause, Florida's alcoholic beverage tax laws granted a tax exemption or reduction to beverages manufactured and bottled in Florida from Florida products ("Florida Products Exemption"). (M.A. 3a-6a) As a Florida court observed, the Florida legislature adopted the Florida Products Exemption "to protect and encourage state industry," *Jacquin-Fla. Distilling Corp. v. Dep't of Business Regulation*, 356 So. 2d 340, 341 (Fla. Dist. Ct. App. 1978), *disapproved on other grounds*, 523 So. 2d 156 (1988). The similarity between the Florida law and the Hawaii law that this Court, in 1984, declared unconstitutional in *Bacchus* prompted the Florida legislature, a year later, to alter the language of the Florida statutes.

The Revised Florida Products Exemption

During the legislative committee hearings to consider changes to the Florida Products Exemption, Florida industry lobbyists pressed the legislature to maintain the protection of local industry. In response, the legislature enacted sections 564.06 and 565.12, Florida Statutes (1985) ("Revised Florida Products Exemption"). (M.A. 7a-16a) The legislature removed the word "Florida" from the sections and, instead, substituted language identifying certain agricultural products whose use would entitle the manufacturers and distributors to tax advantages.

The Revised Florida Products Exemption included one section for wines, section 564.06, and one for distilled spirits, section 565.12. The two sections provided a tax exemption for wines and a tax preference for distilled spirits when the alcoholic content of the beverages was manufactured exclusively from certain designated products. The Florida statutes' designated products were all Florida products: citrus, sugarcane, and certain grape species.

Florida, which is one of the few states to produce citrus and is the predominant producer of citrus, designated for preferential treatment citrus fruits, citrus products, and citrus byproducts. (J.A. 72-73) Florida, which is also one of the few states to produce sugarcane and is the leader in the production of sugarcane, designated for preferential treatment sugarcane and sugarcane byproducts. (J.A. 72-74)

Florida, which cannot produce the grape species, *Vitis Vinifera*, that grape producers generally produce for the manufacture of wine and wine coolers, designated for preferential treatment the six grape species that Florida does produce for the manufacture of wine and wine coolers, *Vitis Rotundifolia, Vitis Aestivalis ssp. Simpsoni, Vitis Aestivalis ssp. Smalliana, Vitis Shuttleworthii, Vitis Munsoniana*, and *Vitis Berlandieri*. (J.A. 78-80)

The Revised Florida Products Exemption also authorized the Florida Division of Alcoholic Beverages and Tobacco to review the laws and programs of the home state or country of any taxpayer who applied for the tax preferences. If the Division determined that the state or country granted the taxpayer any economic advantage, the Florida law authorized the Division to apply a set of provisions to withhold the Florida tax advantages to the out-of-state taxpayer even if it used the favored products.

The legislative history of the Revised Florida Products Exemption indicates that the Florida legislature intended the new statutory scheme to retain the protectionist character of the former Florida Products Exemption.

One Florida sponsor of the new legislation, Representative Jones, explained the purpose of the Revised Florida Products Exemption to three Florida House of Representatives Committees. On April 23, 1985, before the House Committee on Regulated Industries and Licensing, Mr. Jones stated:

> [t]he legislature has been very clear in its intent, and I hope that today we will continue to express our hope that Florida products will be used in the manufacture of these products, and that they will be sold here and throughout the country. . . . I want to make it very clear that, since I'm not an expert in this area, my entire purpose and intent is simply to retain what we have done for the last twenty years.

(J.A. 84) Representative Hargrid, a co-sponsor of the legislation, testified before the same Committee:

> this bill is necessary in order to preserve the home state wine industry that we've begin [sic] to create in this state. I have a winery in my district called St. August Wines of St. Augustine; they have one here in Tallahassee called Lafayette Winery. We are developing wineries all over the state and I encourage your support of this bill.

(J.A. 115) During Mr. Jones' testimony before the Appropriations Committee, the Chairman commented that representatives from the grape industry had contacted him. Mr. Jones assured him that the legislation would in fact "take care of them." (J.A. 116) Before the House Committee on Finance and Taxation, Mr. Jones stated:

> I am here to try to protect some jobs, roughly about 200 jobs in my district that are there because we granted this exemption back in the '60's. The industry, the distilleries that are there, have grown because of the intent of the legislature, and they have been successful in keeping those jobs going when we've lost them in other areas. . . .
>
> With the language that we have here, we are trying to preserve this Florida industry, leaving access to interstate commerce but limiting it in such a way that our industry benefits.

(J.A. 106-09)

Before the Florida Senate Commerce Committee on May 9, 1985, Senator Crawford, the Senate sponsor, reiterated the same theme:

> [f]rankly this bill is a jobs bill. It maintains the status quo of an existing tax exemption which has been a good tax exemption for the State of producing jobs and money for the State. . . .
>
> It allows a reduced rate for people who use citrus products and cane products from Florida. It is a bill that produces a lot of jobs and a lot of money for this State.

(J.A. 120) Before the Florida Senate Finance and Taxation Committee on May 14, 1985, Senator Crawford stated that the bill "maintains the status quo on the current exemption that we have." (J.A. 132)

On the House floor, during the May 28, 1985, debate of the Revised Florida Products Exemption bills, Mr. Jones noted that Florida had "granted a benefit to the distillers in Florida using Florida products for many years." He explained that while the United States Supreme Court's decision in *Bacchus* had disturbed the status quo, the sponsors did not intend to abandon the tax exemption. "We're simply trying to protect what was in place prior to this Supreme Court decision." (J.A. 141-42) During the House floor debates on May 28, 1985, and May 31, 1985, Mr. Jones referred to the legislation as "Florida Products bills." (J.A. 140-51)

The legislative history of the Revised Florida Products Exemption also indicates that the Florida legislators hoped to circumvent the Commerce Clause holding in *Bacchus* by continuing to favor *only* Florida commerce. During the Senate Commerce Committee deliberations, a Florida senator expressed concern that, while encouraging the use of Florida products, the tax exemptions might also encourage the use of out-of-state citrus, grapes, and sugarcane. The Chairman of the Florida Senate Commerce Committee responded that

the Florida statutes, in operation, would favor Florida producers: "[w]e could argue theory but I think reality is much more important." He noted that "the practical effects in reality is [sic] going to accomplish exactly what we want." (J. A. 127-28) Senator McPherson summarized the legislative effort:

> [w]hat Senator Crawford has tried to do is structure the law so that the word "Florida" is not in there and yet you are using primarily Florida products. I don't think anyone really argues with that.

(J.A. 128-29) Immediately before the Senate Committee voted to adopt the bill, the Florida legislators discussed the provisions that allowed Florida to review other states' and countries' laws and programs so that Florida could deny the tax preferences to out-of-state taxpayers who used Florida products. Senator McPherson concluded:

> [t]he way the bill is drafted, it is artfully drafted to take care of the constitutional requirements, but also it is worded in such, and I tried to make this clear, that every state that has a preferential treatment law, which most of these I've mentioned do, then they cannot take advantage of our law so that effectively stops anybody from doing it, so it only continues the status quo as we know it in Florida.

(J.A. 127-30)

Florida's Office of the Governor receives memoranda from Florida's agencies concerning the constitutionality of proposed legislation. The Florida Department of Business Regulation recommended that the Governor veto the Revised Florida Products Exemption. In its memoranda, the Department stated that the revised tax scheme would continue the discriminatory effect of the former Florida Products Exemption. (J.A. 158-65) The Department also warned that the revised discriminatory scheme would leave Florida vulnerable to tax refund actions. (*Id.*)

Florida's Governor allowed the Florida tax scheme to become law without his signature. On July 1, 1985, the Revised Florida Products Exemption, sections 564.06 and 565.12, Florida Statutes (1985), became effective.

McKesson's Action

McKesson has distributed alcoholic beverages at wholesale in Florida and paid substantial excise taxes under sections 564.06 and 565.12, Florida Statutes (1985). (J.A. 261) On September 3, 1986, after the Florida Office of the Comptroller denied McKesson's application for a refund of taxes McKesson paid under the Revised Florida Products Exemption, McKesson filed an action in Florida state court.

McKesson, in its Complaint in the Circuit Court, Second Judicial Circuit, Leon County, challenged the Revised Florida Products Exemption as unconstitutional under the federal and state constitutions. (J.A. 1) In particular, McKesson alleged that the tax scheme discriminated against interstate and foreign commerce in violation of the Commerce Clause and Import-Export Clause, and impermissibly involved Florida in foreign affairs and international relations. McKesson's Complaint prayed that the court declare the Florida statutes unenforceable and also requested a refund of the unconstitutionally collected taxes. (J.A. 10)

In its Complaint, McKesson specifically alleged that it was entitled under Florida's general refund statute, section 215.26, Florida Statutes (1985) (M.A. 23a), to a refund of the discriminatory taxes. (J.A. 7) In its Answer to McKesson's Complaint, the State denied McKesson's allegations of unconstitutionality and challenged McKesson's standing to challenge the statutes and seek a refund. (J.A. 11) The State admitted that McKesson had timely filed a proper application for refund of taxes that it paid pursuant to sections 564.06 and 565.12,

Florida Statutes (1985). (J.A. 14) The State did not raise any defense of sovereign immunity.

One month later, on October 17, 1986, McKesson filed motions for partial summary judgment and for a preliminary injunction. (J.A. 25-80) On November 12 and 26, 1986, Judge Charles E. Miner, Jr. of the circuit court heard arguments. On March 20, 1987, the circuit court entered its order. (J.A. 261) The court found that McKesson had standing to challenge the constitutionality of the tax statutes, noting that McKesson's products compete in the Florida marketplace with the Florida-favored products. (J.A. 263) The court found that the revised statutes –

> were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision. This Court, having reviewed the challenged amendments finds, however, that this legislation failed to surmount the constitutional violations addressed in *Bacchus*.

(J.A. 262-63) The court declared unconstitutional those portions of the statutes that granted tax exemptions or preferences. The court's order included a preliminary injunction that enjoined the State from enforcing the unconstitutional statutory provisions. (J.A. 263)

McKesson in its motion for partial summary judgment had not raised the issue of McKesson's entitlement to a refund of the unconstitutional taxes. Nevertheless, the circuit court proceeded to resolve the issue, stating in its order that its declaration of unconstitutionality would operate only prospectively. (J.A. 263)

On the same day, March 20, 1987, the State filed a Notice of Appeal, which automatically caused a stay of the circuit court's order under Florida Rules of Appellate Procedure 9.310(b)(2). (J.A. 264) McKesson immediately moved the court to vacate the automatic stay, arguing that continued enforcement of the unconstitutional tax scheme

would further expose Florida's revenues to claims for refunds. (J.A. 272-76)

McKesson invited the State to join in the motion to vacate the stay but the State declined. (J.A. 277-90) During the hearing on the motion, counsel suggested that if the court lifted the stay of the injunction, which would cause the Florida firms to pay the same tax rate as the out-of-state firms, the State might agree to escrow the Florida firms' additional payments so they could be more easily refunded if necessary. (J.A. 286) Assistant Attorney General Brown, representing the State, objected, stating that an escrow arrangement would not be necessary or appropriate since Florida law provides for tax refunds. Mr. Brown stated:

> [o]n [the escrow proposal], Your Honor, I've got to jump up and scream . . . . The State would object to that most strenuously . . . . If the Court decides to lift the stay, the practical effect of that will be that beverage distributors around the state, during the interim of the appeal, will pay the full tax rate on all beverages. Those will go into the State Treasury. There is a statutory mechanism in place, Section 215.26, allowing for refunds if we'd be successful on appeal. That administrative process was already created by statute and managed by the Department of Banking and Finance, and I do not wish to see the judiciary interpose itself into the financial management of State Government at this point.

(J.A. 286)

Following Mr. Brown's comments, counsel for McKesson noted also that Florida provides a refund remedy and again urged the court to lift the stay of the injunction to reduce the amount of money that the State would ultimately have to refund:

> we feel that we are entitled to a refund of tax monies paid under these unconstitutional statutes, and that right continues

> to accrue as long as that statute has the constitutional problems which led this court to throw it out . . . the State has a very strong interest in preserving the integrity of the monies it collects under those statutes . . . .

(J.A. 287)

The court denied McKesson's motion to vacate Florida's automatic stay of the court's preliminary injunction against the operation of the Florida tax scheme. (J.A. 291) As a result, Florida continued to collect taxes under the statutes that the court had declared unconstitutional.

In light of the continuing stay, McKesson requested the Florida District Court of Appeal, First District to certify the case to the Florida Supreme Court for immediate review. (J.A. 265) Again, McKesson noted that continued enforcement of the tax scheme exposed Florida's revenues to refund claims. (J.A. 267) McKesson also filed its notice of cross-appeal, challenging the circuit court's decision to restrict its declaration of unconstitutionality and thereby bar retroactive relief. (J.A. 292) On April 13, 1987, the court of appeal certified that the case on appeal was of great public importance requiring immediate resolution by the Florida Supreme Court, and on April 22, 1987, the Florida Supreme Court accepted jurisdiction. (J.A. 294)

In its brief to the Florida Supreme Court, McKesson argued that under both federal constitutional law and Florida law, McKesson is entitled to a refund of taxes it paid pursuant to the unconstitutional tax scheme. (J.A. 323, 367) The State in its brief argued that the circuit court's denial of retroactive relief was proper under federal and state law. (J.A. 374, 393)

On February 18, 1988, the Florida Supreme Court issued its final decree, definitively disposing of all the legal and factual issues in the case. (J.A. 414) In a unanimous opinion, the Florida Supreme Court affirmed the lower court's order declaring unconstitutional those

portions of the Revised Florida Products Exemption that granted tax exemptions or preferences.

First, citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), the Florida Supreme Court found that McKesson has standing "to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact on [its] business[]," and has standing "to assert [its] constitutional right to engage in interstate commerce free of burdens violative of the commerce clause." (J.A. 416)

The Florida Supreme Court held that "the tax scheme at issue places a clear discriminatory burden on interstate commerce . . ." and thereby conferred a competitive advantage on local industry. (J.A. 422) "[T]here are clearly manufacturers and distributors of alcoholic beverages made from local products who receive a competitive advantage from the challenged provisions." (J.A. 425)

The Florida Supreme Court specifically stated that the Florida tax scheme imposed a discriminatory burden similar to what this Court found in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426-27) Quoting from *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida Supreme Court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.' " (J.A. 428)

The Florida Supreme Court, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), also found that the State had failed to show that "the stated local interest could not be promoted as well by alternative means which would have 'a lesser impact on interstate activities.' " (J.A. 428)

The Florida Supreme Court also held that the provisions in the statutes that withheld the tax advantages, for retaliatory purposes, from out-of-state companies that otherwise might have received the

benefits were also unconstitutional. Citing *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 n.18 (1982), and *Great Atlantic & Pacific Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976), the Florida Supreme Court stated that "a state may not enact discriminatory legislation in 'response to another State's unreasonable burden on commerce,' " and stated that "[t]he Commerce Clause itself provides the remedy for discriminatory taxes or requirements placed on out-of-state products." (J.A. 429)

Despite the Florida Supreme Court's finding that the challenged tax scheme disadvantaged McKesson in the Florida market (J.A. 416-29), the Florida court refused to permit McKesson to seek any refund of the discriminatory taxes. (J.A. 430) Rather, the court simply affirmed the circuit court's decision to deny any retroactive relief in light of "equitable considerations." (*Id.*) The court declared that the State had implemented the tax preference scheme "in good faith reliance on a presumptively valid statute." (*Id.*) The court also stated, without any evidence in the record, that McKesson, "if given a refund . . . would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." (*Id.*)

On March 3, 1988, McKesson, in a motion for rehearing, asserted that the Florida Supreme Court's peremptory denial of any relief for the constitutional injury McKesson sustained during the period that Florida collected discriminatory taxes overlooks both federal constitutional law and the Florida Supreme Court's own previous decisions. (J.A. 431) McKesson asked the Florida Supreme Court to determine that McKesson is entitled under both federal constitutional law and state law to receive a tax refund.

On May 2, 1988, the Florida Supreme Court denied, without an opinion, McKesson's motion for rehearing and issued its mandate. (J.A. 448-50)

The Revised, Revised Florida Products Exemption

After the Florida Supreme Court declared the Revised Florida Products Exemption unconstitutional, the Florida legislature recognized that Florida's alcoholic beverage tax statutes no longer discriminated against out-of-state commerce and no longer favored Florida products. The Florida Supreme Court's decision in this case had excised the Florida tax statutes' discriminatory provisions so that the statutes imposed the same tax on out-of-state products as on local products. A few months after the Florida Supreme Court's decision, the Florida legislature enacted a new revised tax scheme. (M.A. 17a-22a) The new Florida tax scheme taxes alcoholic beverages produced in Florida at one rate and taxes alcoholic beverages produced out-of-state at another rate, many times higher. (*Id.*)

The original Florida Products Exemption had provided tax advantages for alcoholic beverages "manufactured in Florida from Florida-grown" products. (M.A. 3a-6a) The Revised Florida Products Exemption continued the tax advantages for Florida firms that used specified Florida products. (M.A. 7a-16a) The Revised, Revised Florida Products Exemption provides tax advantages for alcoholic beverages "manufactured within this state [from] produce from land inspected by Florida agricultural inspectors." (M.A. 17a-22a)

Representative Jones, who sponsored the unconstitutional Revised Florida Products Exemption, also sponsored the new revised law. He explained during the House debate that "[o]ur whole-hearted effort here is to protect something that's been in Florida for some 27 years."[1] (M.A. 46a)

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[1] The legislative history of the new revised law is not in the record in this case because Florida enacted the new law after the Florida Supreme Court decided this case. McKesson has attached a copy of the legislative history to this brief. (M.A. 25a-84a) This Court, of course, has reviewed statutes' legislative history in numerous Commerce Clause cases. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 141-42 n.8 (1978) (Blackmun, J., concurring in part and dissenting in part); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 325-28 (1977). When reviewing legislative history, the Court has emphasized the statements of sponsors. *See, e.g., Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

During the House debate, one legislator protested that if a court declared the new law unconstitutional, "the Department of Revenue is going to have to go out and refund money to all these people that we are collecting these dollars from." (M.A. 60a) The legislator continued:

> I would read to you as a quote from a court . . . it's from the Florida Supreme Court . . . . "When a state statute directly regulates or discriminates against interstate commerce or where its effect is to favor instate economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Without further inquiry is what the Supreme Court said. That's how bad statutes such as this are.

(M.A. 61a)

In response, Representative Simon, a sponsor of the bill, agreed that the dissenting legislator had raised "a real legitimate point" about the "constitutionality of this provision." (M.A. 61a) The sponsor assured the House, however, that if a court held that the new tax scheme violated the Commerce Clause, Florida could still retain the taxes collected under the statutes, without having to refund them. The sponsor referred to the Florida Supreme Court's ruling in this and companion cases:

> [w]e have had a number of cases which have stricken down other statutes. When those cases have come up there was not a requirement to refund the money.

(M.A. 61a) Representative Simon concluded: "there will not be a loss of even dollar one to the State of Florida." (M.A. 62a)

The Florida Department of Business Regulation provided the Office of the Governor with a memorandum for the new revised tax scheme similar to its earlier memoranda for the old revised tax scheme. The Department again recommended a veto of the discriminatory tax scheme. (M.A. 25a) The Department advised that the new scheme violated the Commerce Clause. (*Id.*)

Florida's Governor again allowed the tax scheme to become effective without his signature. The Revised, Revised Florida Products Exemption became effective July 1, 1988.

In August, 1988, Bacardi Imports, Inc. and N. Goldring Corp., sellers and distributors of alcoholic beverages in Florida, filed an action in the Florida circuit court that, *inter alia*, challenged the constitutionality of the new revised tax scheme under the Commerce Clause. In September and November, Judge Charles E. Miner, Jr. of the circuit court conducted hearings concerning the constitutionality of the tax statutes. On November 29, 1988, Judge Miner, the same judge who declared the Revised Florida Products Exemption unconstitutional, declared the Revised, Revised Florida Products Exemption unconstitutional under the Commerce Clause. (M.A. 85a-93a) The new revised scheme, the court held, was just as unconstitutional as the law that the Florida Supreme Court declared unconstitutional in this case.

> [T]here is no question in my mind in a constitutional sense that this statute is but a warmed-over version, dressed up in different clothing perhaps, of that which has previously been, at least on one occasion, struck down as violative of the commerce clause.

(M.A. 88a)

Nevertheless, Judge Miner again made the court's decision prospective only and denied any refund of taxes collected under the unconstitutional statutes. (M.A. 89a-90a)

The State has filed a notice of appeal. (M.A. 94a)

McKesson's Case In This Court

On November 14, 1988, this Court granted McKesson's petition for a writ of certiorari to review the Florida Supreme Court's denial of any retroactive relief from Florida's unconstitutional tax statutes. McKesson in this action seeks a refund for discriminatory taxes that it paid under the Revised Florida Products Exemption. The State did not file any cross-petition asking this Court to review the Florida Supreme Court's decision. Nor has the State otherwise challenged the Florida Supreme Court's decision that the Revised Florida Products Exemption violated the Commerce Clause.

The Court has consolidated this case with *American Trucking Associations, Inc., et al. v. Maurice Smith, Director, etc., et al.*, No. 88-325.

SUMMARY OF THE ARGUMENT

Within this decade, Florida has imposed three successive alcoholic beverage tax schemes that discriminated against interstate commerce. Each tax scheme, authorizing preferential rates on Florida products, has unconstitutionally protected Florida commerce at the expense of interstate commerce.

The Florida Supreme Court, declaring the Revised Florida Products Exemption unconstitutional, acknowledged that the Commerce Clause enforces our national common market. The Florida court followed this Court's numerous decisions that consistently have held that the Commerce Clause prevents one state from protecting its local

commerce by discriminating against the products of other states or nations.

Unfortunately, the Florida court's decision, by denying any retroactive relief from Florida's discrimination, has frustrated Commerce Clause interests. The Florida court refused to grant McKesson, which established the tax statutes' unconstitutionality, any refund of the discriminatory taxes. Further, the court's decision emboldened the Florida legislature to enact yet another discriminatory tax scheme, since Florida's legislators recognized that the Florida courts' declarations of unconstitutionality concerning discriminatory tax statutes did not result in any refunds of taxes. As a result of the successive enactments, the Florida court's decision effectively denied interstate commerce even prospective relief from discrimination. Florida has, in fact, provided a paradigm for a state's protecting local commerce while avoiding any liability for violating the Commerce Clause.

In refusing to grant retroactive relief, the Florida court failed to follow this Court's decisions that have held that a taxpayer's remedy for an unlawful state tax is the recovery of the taxes. This Court has ordered states to return taxes exacted in violation of federal law. For example, the taxpayers in *Maryland v. Louisiana* and in *Iowa-Des Moines Nat'l Bank v. Bennett* received refunds of unlawful taxes.

The Florida court's decision to apply its Commerce Clause holding only prospectively, even though it did not establish a new principle of law, ignored this Court's limitations on a court's power to grant only prospective relief for a violation of federal law. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The State cannot establish, under *Chevron*, that the Florida Supreme Court's decision invalidating the discriminatory Florida statutes should operate only prospectively. The first prong of the *Chevron* standard establishes a threshold test, which ties the standard for prospective relief to its rationale: justifiable reliance on the former

status of the law. The State in this case cannot satisfy the threshold test because it cannot legitimately maintain that the Florida Supreme Court's unanimous decision established a new principle of law. The Florida Supreme Court applied settled Commerce Clause principles that this Court pronounced in cases such as *Hunt* and *Bacchus*.

Even if this Court were to consider the second and third prongs of the *Chevron* standard, McKesson would still be entitled to retroactive relief.

First, the Florida Supreme Court's decision will advance the policies of the Commerce Clause only if it is retroactive. State legislators, who are elected to advance their constituents' interests, understandably respond to pressure to protect local interests at the expense of out-of-state interests. The Florida court's (and other courts') denial of any retroactive relief from protectionist statutes encourages further unconstitutional discrimination against interstate commerce.

Second, this Court's directing Florida to refund the discriminatory portion of the unconstitutional taxes would not be inequitable. Neither of the Florida Supreme Court's two "equitable considerations" for denying relief withstands any scrutiny. The Florida court's first consideration – that Florida implemented the "tax preference scheme" in "good faith reliance on a presumptively valid statute" – simply gives the Florida courts the discretion to decide that no taxpayer may receive retroactive relief in any case under any circumstances. The Florida court's second consideration – that McKesson may not have been injured by the discriminatory tax – contradicts the court's own opinion, in which it recognized that McKesson suffered a significant economic disadvantage as a result of Florida's discrimination. The State's complaint that a tax refund in this case would be inequitable is anomalous in light of Florida's own policy to provide taxpayers refunds of unlawful taxes.

Thus, the Commerce Clause's creation of a national common market and *Chevron*'s limitations on prospectivity require the reversal of the Florida Supreme Court's denial of retroactive relief.

ARGUMENT

I. THE FLORIDA SUPREME COURT DID NOT PROTECT THE COMMERCE CLAUSE'S CREATION OF A NATIONAL COMMON MARKET

The Florida Supreme Court acknowledged that the federal Constitution through the Commerce Clause enforces our national interest in free, unrestricted trade among the states through a national common market. (J.A. 414) The Florida court determined that the Florida tax statutes' discrimination against interstate commerce had breached the national common market. Nevertheless, by denying McKesson relief from Florida's discrimination, the Florida court failed to enforce the national interest in free trade.

The Florida Supreme Court understood that "the Commerce Clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, ___ U.S. ___, 108 S. Ct. 1803, 1807 (1988). The Florida court cited numerous United States Supreme Court cases establishing the Commerce Clause's role in protecting "the common market created by the Framers of the Constitution." *Great Atlantic & Pacific Tea Co. v. Cottrell, Inc.*, 424 U.S. 366, 380 (1976).

The Florida Supreme Court quoted from *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.'" (J.A. 428) A determination that state legislation effects economic protectionism generally requires a finding of unconstitutionality "without further inquiry." *Brown-Forman Distillers v. New York State Liquor Auth.*,

476 U.S. 573, 579 (1986) (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

The Florida Supreme Court determined that Florida had interfered with foreign and domestic commerce through a discriminatory tax scheme that provided a direct commercial advantage to local interests. The Florida court perceived "the same type of discriminatory burden which was recognized" by this Court in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426) The Florida court, therefore, applied the constitutional rule of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), that "a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876 n.6 (1985) (discussing *Bacchus*). "We agree with [McKesson]," the unanimous Florida court concluded, "that the stated purpose of promoting use of Florida products will not justify a discriminatory burden on interstate commerce . . . ." (J.A. 428)

The Florida Supreme Court's resolution of McKesson's federal constitutional challenge comports with this Court's interpretation of the Commerce Clause. A state may not "build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Guy v. Baltimore*, 100 U.S. 434, 443 (1880). *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). A state may not " 'legislate according to its estimate of its own interests [and] the importance of its own products . . . .' " *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (quoting Story, The Constitution, §§ 259, 260).

The Court's solicitude for the Commerce Clause reflects the Court's recognition of the continuing need for review of the innumerable state statutes that threaten the national common market. "[W]hen the centrifugal, isolating or hostile forces of localism are manifested in state legislation, the interests of the union" require judicial intervention. Brown, *The Open Economy: Justice Frankfurter and the*

Position of the Judiciary, 67 Yale L. J. 219, 220 (1957). Justice Holmes remarked:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

Holmes, Collected Legal Papers 291, 295-96 (1921).

Unfortunately, after consideration of McKesson's constitutional claim, the Florida Supreme Court neither corrected Florida's retention of unconstitutional taxes nor discouraged the Florida legislature's enactment of new, unconstitutional statutes.

First, although Florida law permitted McKesson's claim for a refund, the Florida Supreme Court refused to grant McKesson any retroactive relief. The Florida court did not find that McKesson had failed to comply with the Florida statutes that provide taxpayers with a right to a refund for unlawful taxes. Instead, the Florida court, affirming the trial court, decided to make its ruling prospective only.

Second, although the Florida Supreme Court enjoined the enforcement of the Revised Florida Products Exemption, the court's rationale for refusing any retroactive relief effectively denied McKesson any prospective remedy. The Florida legislature quickly decided that Florida, in light of the Florida Supreme Court's ruling in this case, could continue its history of discriminatory taxation without any liability for refunds for the unconstitutional taxes. Thus, in June, 1988, the Florida legislature enacted a new protectionist scheme, the Revised, Revised Florida Products Exemption, that continued to redistribute the burden of Florida's alcoholic beverage taxes to

McKesson and other foreign and domestic firms in interstate commerce.

In essence, Florida has provided a case study of successive discrimination. Several months after this Court's decision in *Bacchus* declared the discriminatory Hawaii tax unconstitutional, the Florida legislature replaced the original discriminatory Florida tax scheme with a revised discriminatory tax scheme. (M.A. 3a-16a) A few months after the Florida Supreme Court declared the revised Florida tax scheme unconstitutional, but rejected any measure of liability, the Florida legislature enacted a new revised discriminatory tax scheme. (M.A. 17a) Florida's original tax scheme, which specifically taxed Florida products at lower rates, imposed significantly greater costs on interstate commerce than on local commerce. Florida's revised tax scheme, which, as the Florida court ruled, also favored Florida products, continued to impose significantly greater costs on interstate commerce than on local commerce. The revised, revised tax scheme, which a Florida court has also declared unconstitutional,[2] continues the tradition of tax discrimination in favor of local industry.

Florida's legislative and judicial consideration of its unconstitutional tax statutes currently serves as a paradigm for other states interested in protecting local commerce while avoiding any liability for violating the Commerce Clause.[3] The Florida Supreme

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[2] Judge Miner of the Florida circuit court, who found the Revised Florida Products Exemption unconstitutional under the Commerce Clause in this case, has already found the Revised, Revised Florida Products Exemption similarly unconstitutional in a new case. Judge Miner concluded that the new statute, "a warmed-over version, dressed up in different clothing," of the previous statute, was unconstitutional under the Commerce Clause. (M.A. 88a) In line with the Florida Supreme Court's decision in this case, Judge Miner made his ruling in the new case prospective only, foreclosing any refunds.

[3] Other state courts have also seized upon prospectivity as a means to avoid refunds of unconstitutional state taxes. *See, e.g., American Trucking Ass'n v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), *cert. granted*, 57 U.S.L.W. 3347 (1988); *Nat'l Can Corp. v. Dep't of Revenue*,

Court's denial of retroactive relief encouraged the legislature to continue to discriminate against interstate commerce. Thus, even after a Florida Supreme Court decision holding the Revised Florida Products Exemption unconstitutional, distributors of out-of-state products still have not secured parity with local competitors. The Florida court's decision in concert with the Florida legislature's enactments has effectively denied McKesson any relief in this case – either retroactive or prospective – for Florida's violation of the Commerce Clause.

II. THE FLORIDA SUPREME COURT FAILED TO FOLLOW THIS COURT'S DECISIONS CONCERNING REMEDIES

The Florida Supreme Court failed to follow this Court's decisions granting appropriate tax refunds as relief to taxpayers from state tax statutes that violated federal law.

This Court, in a long line of cases, has held that taxpayers who successfully challenge state tax statutes on federal grounds are entitled

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109 Wash. 2d 878, 749 P.2d 1286 (1988), *cert. denied* and *appeal dismissed*, 108 S. Ct. 2030 (1988); *Penn Mut. Life Ins. Co. v. Dep't of Licensing & Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), *appeal denied*, 429 Mich. 871 (1987); *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W.Va. 1986) *appeal dismissed*, 107 S. Ct. 1949 (1987); *Private Truck Council of Am., Inc. v. Secretary of State*, 54 U.S.L.W. 2372, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129 (1986); *Metropolitan Life Ins. Co. v. Comm'r of Dep't of Ins.*, 373 N.W.2d 399 (N.D. 1985); *Salorio v. Glaser*, 93 N.J. 447, 461 A.2d 1100 (1983), *cert. denied*, 464 U.S. 993 (1983). *But see Westinghouse Electric Corp. v. Tully*, 63 N.Y.2d 191, 470 N.E.2d 853 (1984); *Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984) (ordering an $18 million tax refund for state tax scheme that violated the Commerce Clause). *Cf. Burlington N. R.R. Co. v. Bd. of Supervisors*, 418 N.W.2d 72 (Iowa 1988) (granting tax refunds for state tax scheme that violated federal statutory law).

to retroactive relief. A taxpayer's remedy for an unlawful state tax statute is the recovery of the taxes.

In *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*, 223 U.S. 280 (1912), the Court held that a Colorado tax statute was unconstitutional. Justice Holmes, in the opinion of the Court, observed that since the taxpayer must first pay the challenged tax, the taxpayer should be able to recover any unlawful taxes: "a man who denies the legality of a tax should have a clear and certain remedy." *Id.* at 285. Similarly, in *Ward v. Love County*, 253 U.S. 17 (1920), the Court reversed the state supreme court's denial of a refund of unlawful county taxes:

> if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. [citations] To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment. . . .

Id. at 24. The Court in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), reaffirmed the rule in *Ward* "that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."

In *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928), the Court reversed a Montana Supreme Court decision denying a recovery of taxes challenged as discriminatory. The Court stated that the Montana court's repudiation of its prior construction of certain discriminatory state statutes –

> does not cure the mischief which had been done under the earlier construction . . . . [The taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

Id. at 504-05. The taxpayer was entitled to retroactive relief since prospective relief would not cure the past discrimination.

In *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), the Court reversed the Iowa Supreme Court's refusal to grant taxpayers a refund of unconstitutional taxes. The Iowa court had determined that a discriminatory state tax had unlawfully denied the injured taxpayers equal treatment. The Iowa court, however, held that the taxpayers' remedy was to secure higher taxes from their competitors. Justice Brandeis noted that the state tax violated the federal Constitution and concluded:

> a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid . . . . The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

Id. at 247. *See also Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923).

In 1981, the Court affirmed the vitality of the Court's rule that states cannot retain unconstitutional taxes. In *Maryland v. Louisiana*, 452 U.S. 456, 457 (1981), the Court, declaring that a Louisiana tax statute violated the Supremacy Clause and was unconstitutional under the Commerce Clause, ordered the state to "refund to the taxpayers any and all revenues . . . with . . . interest . . . ." *See also Dep't of*

Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (affirming Kentucky Court of Appeals judgment that taxpayer was entitled to refund of tax that violated the Export-Import Clause); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952) (reversing Mississippi Supreme Court's denial of refund of tax that violated Commerce Clause); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (reversing North Carolina Supreme Court's denial of refund of tax that violated Commerce Clause).

This Court's decisions, granting refunds to taxpayers successfully challenging state tax statutes, are consistent with the usual rule that judicial decisions operate retroactively. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 2025 (1987); *United States v. Johnson*, 457 U.S. 537, 542 (1982).

The Florida Supreme Court failed to follow (or even cite) this Court's tax refund decisions before deciding against retroactivity in favor of only prospectivity. The Florida Supreme Court evidently reasoned that its discussion of the doctrine of prospectivity provided a constitutional basis for not applying the federal cases and not permitting a tax refund. In the process of constructing its own doctrine, the Florida court proceeded to ignore this Court's restrictions on the utilization of the doctrine of prospectivity with respect to the resolution of federal issues.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court articulated a standard that limits the consideration of prospectivity to unusual cases that meet three tests. First, a court's decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . ." *Id.* at 106. Second, the court shall consider whether the retrospective operation of the new legal rule "will further or retard its operation." *Id.* at 106-07. Third, the court shall "weigh[] the inequity imposed by retroactive application" of the new rule. *Id.* at 107.

This Court's later decisions have confirmed that the *Chevron* standard continues to govern the question of retroactivity in civil actions. *See Griffith v. Kentucky*, 479 U.S. 314, 322 n.8 (1987); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982); *United States v. Johnson*, 457 U.S. 537, 563 (1982). *See also Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, ___ U.S. ___, 108 S. Ct. 2218, 2222 (1988).[4]

The *Chevron* standard establishes a narrow exception to the historic rule of retroactivity. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 2025 (1987). At common law, courts assumed that judicial decisions were to operate retroactively. In 1910, Justice Holmes wrote: "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). *See* 1 W. Blackstone, Commentaries 69 (15th ed. 1809). Over time, members of the Court have acknowledged that courts do create new law and that parties who justifiably relied upon old law sometimes deserve protection. *Linkletter v. Walker*, 381 U.S. 618 (1965). Courts, however, only utilize the "judicial technique" of prospectivity under exceptional circumstances. *See generally* Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907 (1962). *Chevron's* three-prong test permits a court to announce a new principle of law but avoid "penalizing" a party that had justifiably relied to its detriment on the preceding principle of law. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). *See also Lemon v. Kurtzman*, 411 U.S. 192, 206-07 (1973).

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[4] During the last 30 years, the Court has developed an analogous doctrine of prospectivity for criminal cases. *See Griffith v. Kentucky*, 479 U.S. 314 (1987). *See generally* Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1985 U. Ill. L. Rev. 117, 122 (1985).

Chevron places limits on the application of prospectivity because the courts have always placed limits on the latitude for judges to legislate. When a court weighs the merits of applying the law now or applying the law later, the court has adopted the processes of a legislature. "Prospective lawmaking is generally equated with legislation." Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965). *See also Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part).

Chevron acknowledges not only the advantages but also the disadvantages of prospectivity. The power to render a decision only prospective allows a court to acknowledge the societal need for a new rule but minimize the disruptive effect of a clear break with the past. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533 (1977). Unfortunately, the same power that allows change may also encourage change, without sufficient deliberation. "[O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application." *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); *Linkletter v. Walker*, 381 U.S. 618, 644 (1965) (Black, J., dissenting); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 932 (1962).

Further, *Chevron*'s limits on prospectivity serve the Court's interest in institutional stability. Critics of prospectivity have focused on the symbolism that supports the power and prestige of the judiciary. The historical basis for retroactivity – that courts do not make law but rather declare it – underpins the authority of courts to judge the acts of others, particularly the acts of government. A court's undertaking to decide whether to apply law retroactively or just prospectively, therefore, conflicts with the ideal that courts only impersonally apply

the law that they find. *See* Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 62-70 (1965).

Finally, through its three tests, *Chevron* minimizes the disincentive that prospectivity might interpose for potential challenges to unconstitutional activities. The anticipation that the court, if it accepts a party's legal arguments, will not apply the legal principle to the litigant's own case discourages a party from litigating the issue. A general prospectivity doctrine, therefore, might in some cases inhibit the development of the law. *See Mackey v. United States*, 401 U.S. 667, 680 (1971) (Harlan, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term – Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 60-61 (1965). *Cf. Owen v. City of Independence*, 445 U.S. 622, 651 n.33 (1980).

In this case, the Florida Supreme Court improperly ignored the Court's limitations in *Chevron* in its consideration of prospectivity. The states may be free to adopt their own retroactivity-prospectivity doctrine when deciding challenges under state law. The 50 states, nevertheless, are not free to apply 50 different standards when enforcing the federal Constitution. Where a state court holds that the federal Constitution invalidates a state statute, the state court must apply the federal standard to determine how its federal constitutional holding shall operate.[5] Thus, numerous state courts have recognized that *Chevron* provides the appropriate standard in a federal question

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5 *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), does not hold otherwise. *Sunburst* did not involve any denial of federal constitutional rights. Rather, the Court considered whether the federal Constitution prevents a state from determining how its own decisions construing its own laws shall operate. The Court held that it does not. "[*Sunburst*] merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new state common-law rule prospectively only." *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part).

case and have at least purported to apply the standard. *See, e.g., American Trucking Ass'n v. Gray*, 295 Ark. 43, 746 S.W.2d 377, 378 (1988), *cert granted*, 57 U.S.L.W. 3347 (1988); *Nat'l Can Corp. v. Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, 1287 (1988), *cert. denied* and *appeal dismissed*, 108 S. Ct. 2030 (1988); *Exxon Corp. v. Hunt*, 109 N.J. 110, 534 A.2d 1, 8 (1987); *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 314 n.3 (1987); *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *First of McAlester Corp. v. Oklahoma Tax Commission*, 709 P.2d 1026, 1034 (Okla. 1985). Under *Chevron*'s doctrine of prospectivity, a state court may not apply established federal doctrine in a case, but then announce that it does not like the consequences of its holding and, therefore, will fashion its own theory of prospectivity to deny the successful litigant the protection of the law.

As the Court stated in *Chapman v. California*, 386 U.S. 18, 21 (1967), "we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." In *Cohn v. G.D. Searle & Co.*, 784 F.2d 460 (3d Cir. 1986), *cert. denied*, 479 U.S. 883 (1986), the court, exercising diversity jurisdiction, specifically addressed the question of the applicability of the *Chevron* standard. "Where a state statute is held to violate the federal Constitution, the retroactivity *vel non* of that holding is similarly a matter of federal law which we must determine independently." *Id.* at 463.[6]

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6 The court in *Love v. Johns-Manville Canada, Inc.*, 609 F. Supp. 1457, 1460 (1985), noted that –

> it would be somewhat anomalous to countenance a rule which would leave states free to implement or delay implementation of federal constitutional rulings on state law decisional grounds. This is particularly inappropriate when the federal ruling implicates the commerce clause, because that clause is meant to protect against "state action which imposes special or distinct burdens on out-of-state interests unrepresented in the states [sic] political process." [citation omitted].

III. IN LIGHT OF *CHEVRON*, McKESSON IS ENTITLED TO A REFUND OF UNCONSTITUTIONAL TAXES

The State cannot establish, under *Chevron*, that the Florida Supreme Court's decision, invalidating the discriminatory Florida statutes, should operate only prospectively.[7]

A. Since The State Cannot Satisfy *Chevron's* Threshold Test – That The Florida Supreme Court's Decision Established A New Principle Of Law – McKesson Is Entitled To Retroactive Relief

In *Chevron*, this Court emphasized that the first determination for a court resolving the issue of retroactivity or prospectivity is that the decision "must establish a new principle of law."[8]

The Court's reasoning in *Chevron* strongly suggests that unless a decision involves a clear break with previous law, the decision must be applied retroactively. The Court in *Chevron* cites *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968), in which

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[7] Since *Chevron* establishes an exception to the usual rule of retroactivity, the State should bear the burden of showing that retroactivity is not appropriate in this case. *See Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980). *Accord In re Bendectin Litig.*, 857 F.2d 290, 325 (6th Cir. 1988); *Ackinclose v. Palm Beach County*, 845 F.2d 931, 933 (11th Cir. 1988); *Marino v. Bowers*, 657 F.2d 1363, 1375 (3d Cir. 1981) (Weis, J., dissenting); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278, 1288 (7th Cir. 1980), *rev'd on other grounds*, 452 U.S. 205 (1981).

[8] In *Chevron*, as well as in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1981), the Court found that all three prongs of the test militated in favor of prospectivity and had no occasion to state expressly that the first factor operates as a threshold test.

the Court stressed that unless a court overturns a "clearly declared judicial doctrine" upon which the parties relied "in favor of a new rule," the court has "no reason to confront this theory" of prospectivity. *Hanover Shoe* characterizes a change of law that qualifies for prospectivity as "an abrupt and fundamental shift in doctrine," as "an avulsive change which cause[s] the current of the law thereafter to flow between new banks." *Id.* at 499. *Chevron*'s analysis reflects that principle: only after determining that the respondent did not, and could not, foresee that a consistent interpretation of governing law would be overturned, did the Court proceed to address the underlying purpose of the rule and to consider any inequities.

Later Court opinions reinforce the language in *Chevron* that the first prong of the nonretroactivity test operates as a prerequisite for further analysis. In *United States v. Johnson*, resolving a Fourth Amendment issue, the Court noted that –

> [i]n the civil context . . . the "clear break" principle has usually been stated as a *threshold test* for determining whether or not a decision should be applied nonretroactively.

457 U.S. 537, 550 n.12 (1982) (emphasis added) (citing *Chevron* and *Hanover Shoe*). Similarly, Justice Stewart, dissenting in *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972), noted that prospectivity is considered only when the Court announces an unforeseeable new rule.

Scholars have interpreted *Chevron* as establishing the first factor in prospectivity analysis as a threshold test. The issue of prospectivity properly arises only when a decision of law constitutes a new, unanticipated rule. "[I]t is fundamental that the rule whose retroactivity is at issue be a newly announced rule." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745, 763-64 (1983). *See also* Note, *Prospective Application of Judicial Decisions*, 33 Ala. L. Rev. 463, 482 (1982) The original rationale for

prospectivity – "to ease the burden of an unexpected change of law on people who relied on the old rule" – means that "a court should grant relief *only* when a court has made an 'unexpected change of law.' " Note, *Confusion in Federal Courts: Application of the Chevron Test in Retroactive-Prospective Decisions*, 1 U. Ill. L. Rev. 117, 137 (1985). *See* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1620 (1975).

Federal and state courts generally have accepted the logic of Chevron's first prong as a threshold requirement. The federal courts have been "emphatic in demanding novelty as a prerequisite to retroactivity analysis in both civil and criminal matters." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. Rev. 745, 764 (1983). A majority of the federal Circuits applying *Chevron* have expressly viewed *Chevron*'s first prong as a threshold test that must be met before the presumption of retroactivity can be overcome.[9] Most state courts considering prospectivity require a threshold determination that the decision involves a clear break with former law.[10]

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[9] *See, e.g., Kremer v. Chemical Construction Corp.*, 623 F.2d 786, 789 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982); *Gluck v. U.S.*, 771 F.2d 750, 756 n.6 (3d Cir. 1985); *EEOC v. Texas Indus.*, 782 F.2d 547, 551 (5th Cir. 1986); *Lund v. Shearson/Lehman/American Express*, 852 F.2d 182, 183 (6th Cir. 1988); *Rakovich v. Wade*, 850 F.2d 1180, 1208 n.20 (7th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3376 (1988); *Wiltshire v. Standard Oil Co.*, 652 F.2d 837, 840 n.2 (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Mitchell v. City of Sapulpa*, 857 F.2d 713, 716 (10th Cir. 1988); *Acoff v. Abston*, 762 F.2d 1543, 1548, n.6 (11th Cir. 1985); *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 425 and n.19 (D.C. Cir. 1987).

[10] *See, e.g., Nat'l Can Corp. v. Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, 1288 (1988), *cert. denied* and *appeal dismissed*, 108 S. Ct. 2030 (1988); *Exxon Corp. v. Hunt*, 109 N.J. 110, 534 A.2d 1, 8 (1987); *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *McCann v. Scaduto*, 71 N.Y.2d 164, 519 N.E.2d 309, 314 and n.3 (1987); *Poppleton v. Rollins, Inc.*, 735 P.2d 286, 289 (Mont. 1987); *Ryan v. City of Chicago*, 148 Ill. App. 3d 638, 499 N.E.2d 517, 521 (1986), *appeal denied*, 505 N.E.2d 36 (1987); *Mihalcik v. Celotex Corp.*, 354 Pa. Super. 163, 511 A.2d 239, 243 (1986); *Casas v. Thompson*, 42 Cal. 3d 131, 141, 720 P.2d 921 (1986), *cert. denied*, 479 U.S. 1012 (1986); *Federated Mut. Ins. Co. v. DeKalb County*, 255 Ga. 522, 341 S.E.2d 3, 5 (1986).

In its opinion, the Florida Supreme Court never suggested that its unanimous declaration of the unconstitutionality of the Revised Florida Products Exemption established a new principle of law, either by overruling past precedent or by deciding an issue of first impression. Instead, in finding that the Florida tax scheme violated the federal Constitution, the Florida court simply applied settled Commerce Clause principles that this Court announced in similar cases concerning unconstitutional state statutes. The Florida court certainly did not effect an "avulsive change" in Commerce Clause doctrine. *See Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968).

Quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980), the Florida court acknowledged "the 'general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.' " (J.A. 428) Citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), the Florida court found that the Florida tax scheme imposed a discriminatory burden on interstate commerce. (J.A. 422-28) Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Florida court found that the State had failed to show that "the stated local interest could not be promoted as well by alternative means which would have 'a lesser impact on interstate activities.' " (J.A. 428)

As the Florida Supreme Court noted, the State cited *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), to argue that "a State may enact laws pursuant to its police powers that have the purpose and

effect of encouraging domestic industry." 468 U.S. at 271. The Court in *Bacchus* continued: "[h]owever, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Id. Bacchus* further informed Florida that " 'in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.' " *Id.* at 272 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 337 (1977)). The Florida court, of course, found such unconstitutional discrimination.

In passing the discriminatory tax scheme, Florida's legislators stated that they intended the tax scheme to strengthen the Florida alcoholic beverage industry, which, they said, needed the tax preference to survive. (J.A. 106, 115) *Bacchus*, however, informed Florida that state taxes may not discriminate against out-of-state products to strengthen domestic commerce. *Id.* at 272-73 (citing *Guy v. Baltimore*, 100 U.S. 434, 443 (1880), and *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The State cannot legitimately claim that the Florida Supreme Court in this case, which applied settled Commerce Clause doctrine, established a new principle of law. The Florida court found that Florida's discrimination in this case was as unconstitutional as North Carolina's discrimination in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333 (1977). (J.A. 426-27) As this Court observed in *United States v. Johnson*, 457 U.S. 537, 549 (1982), "when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively."

The State cannot meet *Chevron*'s threshold test.

B. If The State Had Satisfied *Chevron's* Threshold Test, The Court's Consideration Of *Chevron's* Remaining Two Tests Would Demonstrate That McKesson Is Entitled To Retroactive Relief

The State cannot establish that the Florida Supreme Court's decision constitutes a fundamental shift in the law that permits a consideration of prospectivity. Only a retroactive decision, permitting McKesson's refund claim for discriminatory taxes, is appropriate. Moreover, if the Florida court had issued a new rule, neither a review of the Commerce Clause's purpose nor a review of the equities would favor only prospectivity.

Commerce Clause Policies

Under *Chevron*'s second prong, the Court must consider whether retrospective operation will further or retard the new rule's operation. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). In *Chevron*, the Court found that retroactive application of the new rule for a statute of limitations in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), would undermine the federal act at issue. *Id.* at 107-8. Similarly, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1981), the Court found that retroactive application of the new rule would not further its operation. In contrast, the Florida Supreme Court's decision, which does not establish a new rule of law, will further the Commerce Clause's protection of the national common market only if the decision is retroactive.

The Florida court's decision, if retroactive, will further the Commerce Clause by announcing that taxpayers in interstate commerce do have a remedy for unconstitutional discriminations. If Florida may breach the national common market, and keep the unconstitutional taxes, the Commerce Clause would merely express the national interest but not vindicate it. "If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must

be attached to their violation." *Hobby v. United States*, 468 U.S. 339, 359-60 (1984) (Marshall, J., dissenting) (footnote and citation omitted). McKesson and other out-of-state taxpayers paid discriminatory taxes so that Florida's tax system could subsidize the development of its local industry. A return of the discriminatory payments will serve the purpose of rectifying the unconstitutional taxation.

The Florida court's decision, if retroactive, will further the Commerce Clause by forcing state legislators (and executives) to recognize that state enactments that unconstitutionally discriminate against interstate commerce will have significant consequences. *Cf. Owen v. City of Independence*, 445 U.S. 622, 651-62 (1980).

State legislators, who are elected to advance their constituents' interests, understandably respond to parochial pressures to protect local interests. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986). As the Florida legislators' comments indicate, state legislators frequently consider the enactment of tax schemes that discriminate against interstate commerce by favoring local interests and disfavoring out-of-state firms. "Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states," and states "may also use taxation not to raise revenue but to protect the state's producers or other sellers from the competition of nonresidents." R. Posner, Economic Analysis of Law § 26.3 at 602 (3d ed. 1986).[11]

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[11] *See also* J. Choper, Judicial Review and the National Political Process 205-06 (1980); J. Ely, Democracy and Distrust 83-84 (1980); Smith, *State Discriminations Against Interstate Commerce*, 74 Calif. L. Rev. 1203, 1206-10 (1986); P. Hartman, Federal Limitations on State and Local Taxation § 1:3 (1981); Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 Vand. L. Rev. 473, 482-83, 490 (1978).

Presumably, states usually do not intend for their tax legislation to violate the federal Constitution. States, however, do frame their tax statutes to satisfy their own voters. Out-of-state interests generally cannot exert counterbalancing political pressures to defeat protectionism. *See Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940); *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 184-85 n.2 (1938). *Cf. Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978).

> [S]tate and local lawmakers are especially susceptible to pressures which may lead them to make decisions harmful to the commercial interests of those who are not constituents of their political subdivisions. That recognition reflects not a cynical view of the failings of statesmanship at a sub-federal level, but only an understanding that the proper structural role of state lawmakers *is* to protect and promote the interests of their own constituents.

L. Tribe, American Constitutional Law § 6-5 at 409 (2d ed. 1988). *See also id.* at § 6-1.

A court's interpretation of the federal Constitution may determine whether "the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause . . . ." *Nippert v. Richmond*, 327 U.S. 416, 434 (1946). In Florida, the Florida Supreme Court's decision, declaring tax statutes unconstitutional but providing no retroactive relief, did not stimulate the Florida legislature to consider the constitutionality of new tax legislation. The Florida legislative and executive branches certainly were not "at pains" to enact constitutional tax legislation. The Florida legislator who sponsored not only the unconstitutional tax scheme in this case, but also the unconstitutional tax scheme that replaced it,

reassured other legislators that their concerns about the constitutionality of the new statutes were unwarranted:

> [w]e have had a number of cases which have stricken down other statutes. When those cases have come up there was not a requirement to refund the money.

(M.A. 61a)

Thus, the Florida court's denial of any retroactive relief had the practical effect of encouraging the Florida legislature to enact protectionist legislation. The Florida court's decision informed the Florida legislature that Florida may retain the unconstitutional taxes that flow from discrimination against interstate commerce. The Florida legislature's response to the Florida court's decision was a third unconstitutional tax on interstate commerce.

This Court's approval of the Florida court's decision would further embolden Florida and other states to ignore the Commerce Clause's proscriptions against unconstitutional tax discrimination. Conversely, judicial disapproval of Florida's use of prospectivity would advance the operation of the Commerce Clause.

Equities

Under *Chevron*'s third prong, a court must weigh any inequity that retroactive operation would impose. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971). In *Chevron*, *Lemon*, and *Northern Pipeline*, the Court found that retroactive operation of the new legal rule, which significantly changed the status of the law, would produce substantial inequity *because* one party had justifiably relied on the former legal rule. *See Chevron*, 404 U.S. at 108; *Lemon*, 411 U.S. at 203; *Northern Pipeline*, 458 U.S. at 88. In contrast, the State in this case cannot possibly claim any such justifiable reliance since the Florida Supreme Court's decision did not change the status of the law, and

therefore cannot claim that retroactivity will cause inequity.[12] Nevertheless, the Florida Supreme Court reviewed the State's thorough presentation of "equities" and found two "equitable considerations" to justify its denying any retroactive relief. Neither consideration withstands scrutiny.

First, the Florida court stated that the taxing agency had implemented the "tax preference scheme" in "good faith reliance on a presumptively valid statute." (J.A. 430) Under the Florida court's rewriting of *Chevron*'s first prong, the State does not have to show that the Court's decision established a new rule of law, and that the State justifiably relied on the previous rule of law. Instead, the State may simply show that, in implementing the discriminatory tax scheme, the State's taxing authorities relied on the "presumptively valid" Florida statutes that created the discriminatory tax scheme. Of course, all Florida statutes, under Florida law, are presumptively valid until the Florida Supreme Court has held otherwise. *See A.B.A. Indus. Inc. v. Pinellas Park*, 366 So. 2d 761, 763 (Fla. 1979). Therefore, the Florida court's consideration is equivalent to the statement that the Florida courts have discretion to find that taxpayers may not receive retroactive relief in any case under any circumstances. The Florida Supreme Court's approach to the equities would find a basis for prospectivity in every case.

Second, the Florida Supreme Court, in a sentence, proffered an economic analysis of the equities. The court stated that McKesson, if the court were to order a refund, "would in all probability receive a

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12 In *Cash v. Califano*, 621 F.2d 626, 629 (4th Cir. 1980), the court observed that *Chevron*'s third prong is closely tied to the first prong. "Absent some surprise engendered by a current judicial interpretation, a litigant cannot be heard to demand nonretroactivity on the basis of inequity." *Id.* at 629.

windfall, since the cost of the tax has likely been passed on to their customers." (J.A. 430)[13]

The Florida court's own opinion refutes its facile economic conclusion about a "windfall." The court stated that the unconstitutional tax scheme "strips away" from McKesson and other interstate competitors their "competitive and economic advantages" in order to benefit local competitors. (J.A. 427) "Florida's alcoholic beverage tax scheme," the court opined, "clearly raises the relative cost of doing business" for McKesson and others. (*Id.*)

The Florida Supreme Court recognized that McKesson's and many other interstate distributors' highly-taxed products directly competed with lightly-taxed Florida products. Florida consumers were free to buy McKesson's alcoholic beverages, other distributors' local beverages, or non-alcoholic alternatives. In the face of competition, McKesson could not raise its Florida prices to cover all its Florida taxes *and* retain its original market share. Either McKesson could absorb all or most of the taxes and attempt to retain its original market share, or McKesson could increase its price to cover all or most of the taxes and lose some of its original market share. Under either economic scenario, McKesson suffered a significant economic disadvantage.

Florida's legislators understood the economics of the unconstitutional tax. They realized that the statutes would benefit Florida businesses at the expense of their interstate competitors (J.A. 84, 106-09), and they passed the protectionist tax scheme in order to

[13] The Florida Supreme Court purported to resolve the economics of Florida's taxes even though McKesson (and all other parties) had never addressed the issue. In connection with its motions in the trial court for a preliminary injunction and partial summary judgment, McKesson had not requested the court to determine the amount of a refund. The trial court, after ruling that the Florida tax scheme was unconstitutional, simply had declared that its ruling would operate only prospectively. (J.A. 263)

reallocate Floridians' demand among interstate and local products. (J.A. 84, 106-09, 120) McKesson and other interstate competitors would lose, and local firms would gain, revenues and jobs. (J.A. 106-09, 120, 127-30).

The Florida court failed to consider the limitations of the judicial process in the review of economic issues. The court's pronouncement of a potential windfall fails to confront – even in general terms – the intricate economics of tax incidence:

> [i]n the end, economic [tax] incidence will depend on how the economy responds. This response depends on conditions of demand and supply, the structure of markets, and the time period allowed for adjustments to occur. Adjustments to a tax will cause factor and product prices to change, and these changes will affect [sellers and buyers], thus determining the burden distribution among them.

R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 268-69 (4th ed. 1984). The Florida court did not attempt to apply tax incidence theory[14] to determine whether McKesson could transfer the burden of the discriminatory tax to its customers. *Compare Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267-68 n.7 (1984).

This Court's decisions concerning the economics of "passing-on" in antitrust cases are instructive. The Court in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-94 (1968), had to reconcile the national interest in effective enforcement of federal antitrust laws with an antitrust violator's interest in disproving a victim's economic harm. The Court refused to permit a monopolist to introduce evidence that its customer did not suffer an actual economic

[14] *See generally* W. Hellerstein, State and Local Taxation of Natural Resources in the Federal System: Legal, Economic and Political Perspectives ch. 4 (1986); D. Phares, Who Pays State and Local Taxes 29-58 (1980).

injury, finding that a demonstration of the economics of "passing-on" requires a showing of "virtually unascertainable figures." *Id.* at 493. To burden antitrust proceedings with that normally "insurmountable task" would make antitrust actions "long and complicated proceedings involving massive evidence and complicated theories." *Id.* Few injured parties, of course, would litigate. The Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1972), noted:

> [t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions "in the real economic world rather than an economist's hypothetical model," 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom. [Footnote omitted]

This Court's analysis in *Hanover Shoe* provides an appropriate model for the analysis in this case. The Court's protection of the Commerce Clause, of course, is as important as the vindication of the antitrust laws. Taxpayers who suffer an unconstitutional tax should not bear the burden of convincing state courts that the complicated theories of tax incidence compel a refund of unconstitutional taxes. Few taxpayers can afford to finance Commerce Clause challenges to unconstitutional state tax statutes. Even fewer taxpayers will volunteer to litigate the issues if economic demonstrations of tax incidence must precede any recovery. The State has the burden of showing that retroactivity is not appropriate for this case. The Court should not permit Florida to condition McKesson's right to a refund upon a proof of the economics of the taxes.

In essence, the Florida Supreme Court's analysis of Florida's "presumptively valid statutes" and McKesson's "windfall" rests upon an unusual view about the equities. The Florida court's opinion presumes that the State's extracting unconstitutional taxes through discriminatory statutes might be equitable, but that the court's

correcting the constitutional injury through a refund of the discriminatory portion of the taxes might be inequitable.

Neither Florida's tax refund statutes nor previous Florida court opinions supports that view of the equities.

McKesson filed this action in the Florida courts because Florida law acknowledges the State's general obligation to return unlawful taxes.[15] Florida's general tax refund statute, section 215.26, Florida Statutes (1985), under which McKesson has sought its tax refund in this case, represents Florida's policy to waive sovereign immunity and permit refund actions against the State. "There have been many suits in Florida to determine the validity of a tax and to direct the making of a refund by the Comptroller under F.S. Section 215.26, F.S.A. . . . ." *State ex rel. Victor Chemical Works v. Gay*, 74 So.

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[15] Under the Tax Injunction Act, 28 U.S.C. § 1341, McKesson could not invoke federal district court jurisdiction since Florida refund procedures appeared to be available. *See California v. Grace Brethren Church*, 457 U.S. 393, 412-17 (1982); *Tully v. Griffin, Inc.*, 429 U.S. 68, 73-77 (1976); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298-301 (1943). However, if Florida is permitted effectively to foreclose any opportunity for taxpayers, who challenge a tax scheme but continue to pay the taxes, to recover the taxes once the taxes are found unconstitutional, the Tax Injunction Act should no longer bar taxpayers from seeking federal injunctive relief. The Court in a divided opinion has held that a state remedy that allows tax refunds but does not allow recovery of interest on the refunds is sufficient to bar jurisdiction. *Rosewell v. La Salle Nat'l Bank*, 450 U.S. 503 (1981). The Court, however, has not held that a remedy that does not allow any recovery at all is sufficient. Indeed, the Court permitted federal jurisdiction in *Hillsborough v. Cromwell*, 326 U.S. 620 (1946), because the state remedy did not clearly afford full protection of federal rights. *Id.* at 625-26. *Cf. American Trucking Association, Inc. v. Gray*, ___ U.S. ___, 108 S. Ct. 2 (Blackmun, Circuit Justice 1987) (granting application for injunction; stating that Arkansas' denial of recovery of unconstitutional taxes would constitute irreparable injury). Therefore, the State's peremptory denial of any retroactive relief may cause taxpayers to seek federal court relief, which ultimately may prove more intrusive than properly granting refunds in particular cases. *See* Note, *The Tax Injunction Act and Suits for Monetary Relief*, 46 U. Chi. L. Rev. 736, 743 (1979).

2d 560, 564 (Fla. 1954). *See also Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d 295, 297 (Fla. 1967); *State ex rel. C.P.O. Mess (Open) v. Green*, 174 So. 2d 546, 550-51 (Fla. 1965). McKesson, as the payer of the taxes, is the party who is entitled to a refund. (M.A. 23a)

Indeed, before the Florida Supreme Court constructed its doctrine of prospectivity in this case, the court had been particularly solicitous of taxpayers' rights to recover invalid taxes. For example, in *State ex rel. Palmer-Florida Corp. v. Green*, 88 So. 2d 493, 495 (Fla. 1956), the Florida Supreme Court, ordering a tax refund, stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes. As another example, in *Walgreen Drug Stores Co. v. Lee*, 158 Fla. 260, 28 So. 2d 535, 536 (1946), the Florida court noted the "well-settled rule" that tax statutes, if susceptible of two meanings, should be construed in a manner most favorable to the taxpayer. *See also Overstreet v. Ty-Tan, Inc.*, 48 So. 2d 158, 160 (Fla. 1950). The Florida court generally has held that at least the taxpayers who actually challenged the statutes were entitled to the statutory tax refunds. *See, e.g., Osterndorf v. Turner*, 426 So. 2d 539 (Fla. 1982).[16]

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[16] The Florida Supreme Court has made certain decisions concerning tax statutes prospective only. In almost all cases, the taxpayers who actually challenged the statutes were entitled to the statutory tax refunds. *See Colding v. Herzog*, 467 So. 2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 580 (Fla. 1984); *Interlachen Lakes Estates, Inc. v. Brooks*, 341 So. 2d 993, 995 (Fla. 1976); *City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 7 (Fla. 1972). In *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973), the Florida court approved the denial of refunds where all 350,000 taxpayers had paid the tax without protest and the refund for each taxpayer would have been slight. *See Coe v. Broward County*, 358 So. 2d 214, 216 (Fla. Dist. Ct. App. 1978) (construing *Gulesian* "to have carved out a very narrow exception to the taxpayer's right to a refund," and reversing trial court's denial of $3,800,000 in tax refunds).

Florida historically has recognized the obvious equity of refunding unlawful taxes to taxpayers. As Justice Cardozo noted, a government should have no interest in retaining taxes that it has unlawfully collected. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378-79 (1933). Thus, the State's argument that a tax refund in this case would be inequitable is anomalous.[17]

Florida may not continue to use the Florida legislature's tax policies and its supreme court's prospectivity doctrine to frustrate the Constitution's interest in a national common market. McKesson and other out-of-state firms may not avoid their obligation to pay constitutional taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). Similarly, Florida may not avoid its obligation to return to McKesson unconstitutional taxes.

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[17] As the Court recognized in *Ward v. Love County*, 253 U.S. 17, 24 (1920), the equitable policy underlying the Takings Clause of the Fifth Amendment provides an analogy:

> [t]o say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these [taxpayers] arbitrarily and without due process of law.

Recently, in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S. Ct. 3141, 3147 n.4 (1987), the Court stated that the Takings Clause precludes forcing a few property owners to bear the burdens that, in fairness, the public should bear. By comparison, the State in this case, in rejecting any claim for retroactive relief, compels McKesson and other sellers of interstate goods to bear the total burden of Florida's unconstitutional actions.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree only with respect to its declaration of prospectivity and direct the court to order a tax refund to McKesson of the statutory difference between what McKesson paid in taxes under the unconstitutional Revised Florida Products Exemption and what McKesson would have paid in taxes under the Revised Florida Products Exemption's rates for the favored products.

Dated: January 6, 1989

Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries)
and Affiliates

Armor All Products Corporation

Armor All Products of Canada, Inc.

Armor All Products GmbH

APC Chemicals, Inc.

City Properties, S.A.

Comercial Farmaceutica Interamericana, S.A.

Comercial Interamericana, S.A. (Dom. Rep.)

Comercial Interamericana, S.A. (El Salvador)

Comercial Interamericana, S.A. (Guatemala)

Computer Aided Systems, Inc.

Corporacion Bonima, S.A.

Corporacion Interamericana, S.A.

Distribuidora Farmaceutica Calox Colombiana, S.A.

Intercal, Inc.

Investigaciones Farmoquimicas De Colombia, S.A.

Laboratorios Calox, C.A.

Medilog Corporation

Medilog GmbH

Mount Gay Distilleries Limited

Organizacion Farmaceutica Americana, S.A.

PCS, Inc.

PCS of New York, Inc.

PCS Services, Inc.

Pharmaceutical Card System Canada, Inc.

Pharmaceutical Data Services, Inc.

SDC Distributing Corp.

CHAPTER 564
WINE

564.06 Excise taxes on wines and beverages; exemptions.

564.06 Excise taxes on wines and beverages; exemptions.–

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon.

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, manufactured in Florida form Florida-grown fresh fruits, berries, or grapes and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in Florida and bottled in Florida, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight manufactured and bottled in Florida form Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries and mangoes, and not from concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon, except that this tax shall not be required to be paid upon all wines manufactured in Florida form fresh fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state, bottled within this state, and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon, except that this tax shall not be required to be paid upon all natural sparkling wines manufactured in Florida from fruits, berries, or grapes grown in Florida and not from concentrates thereof, except concentrates of fruits, berries, or grapes grown and concentrated in this state and bottled within this state.

(5) As to all beverages taxed under this section which are manufactured or bottled in Florida, there shall be a 2-percent discount allowed to the manufacturer or bottler on the amount of taxes assessed against wine for his losses form shrinkage, in filtering, breakage, and waste in bottling, the 2 percent to be computed on the taxable amount assessed by the state when sold taxpaid; and the 2 percent shall be deducted by the manufacturer or bottler on his monthly report.

(6) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(7) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted with the tax is delinquent at the time of payment.

(8) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(9) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

CHAPTER 565
LIQUOR

565.12 Excise tax on liquors and beverages.–

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not form concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.15 per gallon.

(2)(a) As to beverages containing more than 48 percent alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages manufactured and bottled in this state from Florida-grown citrus products, citrus byproducts, honey, fresh fruits, berries, grapes, sugarcane, guavas, potatoes, peaches, papayas, strawberries, and mangoes, and not form concentrates thereof, except concentrates grown and concentrated in the state, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax a the rate of $4.75 per gallon.

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post

exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

BEVERAGE LAW: ADMINISTRATION

564.06 Excise taxes on wines and beverages; exemption.–

(1) As to beverages including wines, except natural sparkling wines and malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, there shall be paid by all manufacturers and distributors a tax at the rate of $2.25 per gallon

(2) As to all wines, except natural sparkling wines, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shutleworthii, Vitis munsoniana,* or *Vitis berlandieri,* or from concentrates thereof, except for flavoring extracts, and upon all other such beverages, except malt beverages, containing more than 1 percent alcohol by weight and less than 14 percent alcohol by weight, of which the alcohol content is manufactured exclusively from citrus fruits, varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* or *Vitis berlandieri,* citrus products, citrus byproducts, sugarcane, sugarcane byproducts, or from concentrates thereof, except for flavoring extracts, the tax imposed by subsection (1) shall not apply.

(3) As to all wines, except natural sparkling wines containing 14 percent or more alcohol by weight, there shall be paid by manufacturers and distributors a tax at the rate of $3 per gallon except that this tax shall not be required to be paid upon all wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* or *Vitis berlandieri,* or from concentrates thereof, except for flavoring extracts., and containing 14 percent or more of alcohol by weight.

(4) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $3.50 per gallon except that this tax shall not be required to be paid upon all natural sparkling wines of which the alcoholic content is manufactured exclusively from citrus fruits or varieties of the species *Vitis rotundifolia, Vitis aestivalis ssp. simpsoni, Vitis aestivalis ssp. smalliana, Vitis shuttleworthii, Vitis munsoniana,* or *Vitis berlandieri,* or from concentrates thereof, except for flavoring extracts.

(5) Wine used by an established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) The exemption from the payment of taxes provided in subsections (2), (3), and (4) does not preclude the division from making periodic inspections necessary to carry out the provisions of this section.

(8) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The exemptions from payment of taxes provided in subsections (2), (3), and (4) or the tax rates set forth in subsection (10) shall not apply:

(a) To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

(b) To alcoholic beverages manufactured or bottled in states, territories, or countries tries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

(c) To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Funding for research purposes or retail sale of wine at licensed wineries shall not be construed as an "economic incentive or advantage" within the meaning of this subsection.

(10)(a) For the months of July and August each year the tax rate for the products specific din subsection (2), except for wine coolers which are defined below in paragraph (b), shall be $2.25 per gallon. Otherwise, the tax rate for these products, except wine coolers, will be determined as follows:

1.By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of the products specified in subsection (2).

Total gallons sold in the month prior to the time of calculation the time of calculation	The new per gallon tax rate for all gallons sold in the month following
0 - 10,000	0.00
10.001 - 20,000	0.35
20,001 - 30,000	0.55

30,000 - 40,000.....0.75
40,001 - 50,000.....0.95
50,001 - 60,000.....1.15
60,001 - 70,000.....1.25
70,001 - 80,000.....1.45
80,001 - 90,000.....1.65
90,001 - 100,000.....1.85
100,001 - 110,000.....2.05
Above 110,000.....2.25

(b) For the months of July and August 1985, 40 cents per gallon will be the tax for wine coolers; a combination of wine, as described in subsection (2); carbonated water; and flavors of fruit juices and preservatives containing 1 to 6 percent alcohol content by volume. Thereafter, the tax rate for wine coolers will be determined as follows:

1.By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of wine coolers.

2.The total of sales referred to in subparagraph 1, of this paragraphs shall determine the sole tax rate applicable to all gallons sold in e month after the time of calculation according to the table set forth below:

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of March, April, May, June, July, and August	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 250,000	0.40
250.001 - 275,000	0.65
275,001 - 300,000	0.90
300,001 - 325,000	1.15

325,001 - 350,000.....1.40
350,001 - 375,000.....1.65
375,001 - 400,000.....1.90
Above 400,000.....2.25

Sales of wine coolers in the month prior to the time of calculation for each month for the 6-month period of September, October, November, December, January, and February	The new per gallon tax rate for all gallons sold in the month following the time of calculation
0 - 100,000	0.40
100.001 - 125,000	0.65
125,001 - 150,000	0.90
150,001 - 175,000	1.15
175,001 - 200,000	1.40
200,001 - 225,000	1.65
225,001 - 250,000	1.90
250,001 - 275,000	2.15
Above 275,000	2.25

(c) For the months of July and August each year, the tax rate forth products specified in subsection (3) shall be $3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1.By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2.The total of sales referred to in subparagraph 1, of this paragraph, shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation the time of calculation	The new per gallon tax rate for all gallons sold in the month following
0 - 12,500	1.50
Above 12,500	3.00

(c) For the months of July and August each year, the tax rate forth products specified in subsection (4) shall be $3 per gallon. Thereafter, the tax rate for these products will be determined as follows:

1.By the 20th of each month (hereinafter, the "time of calculation"), commencing August 20, 1985, the Department of Business Regulation shall determine the prior month's gallonage sales of these products.

2.The total of sales referred to in subparagraph 1, of this paragraph shall determine the sole tax rate applicable to all gallons sold in the month after the time of calculation according to the table set forth below:

Total gallons sold in the month prior to the time of calculation the time of calculation	The new per gallon tax rate for all gallons sold in the month following
0 - 2,000	1.50
20.001 - 4,000	2.00
4,001 - 6,000	2.50
6,001 - 8,000	3.00
Above 8,000	3.50

(e) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax

rates applicable for the following month base don preceding paragraphs (10)(a), (b), (c), and (d).

(11) Any new applicant for the tax exemptions provided in subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c)(, or paragraph (10)(d), shall apply for those rates between July 1 and July 31 of each year, and shall pay an annual nonrefundable application fee of $3,000. The division shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(12) Each manufacturer authorized to do business under the tax exemption provide din subsection (2), subsection (3), or subsection (4), or for the tax rates set forth in paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10(d), shall pay an annual license fee of $1,000 plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall rep monthly the source of raw materials used to manufacture the products eligible for the tax exemptions or rates set forth in subsection (2), subsection (3), or subsection (4), or paragraph (10)(a), paragraph (10)(b), paragraph (10)(c), or paragraph (10)(d).

(13) All revenue collected pursuant to subsections (11) and (12) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

565.12 Excise tax on liquors and beverages.–

(1)(a) As to beverages containing 14 percent or more of alcohol by weight and not more than 48 percent of alcohol by weight, except wines, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $6.50 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts,

the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.35 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1.To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or requirements on alcoholic beverages manufactured or bottled outside of their boundaries;

2.To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3.To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(2)(a) As to beverages containing more than 48 percent of alcohol by weight, there shall be paid by every manufacturer, distributor, and vendor a tax at the rate of $9.53 per gallon.

(b) As to all such beverages of which the distilled spirits are manufactured exclusively from citrus products, citrus byproducts, sugarcane, and sugarcane byproducts, except for flavoring extracts, the tax imposed by paragraph (a) does not apply. However, in lieu thereof there shall be paid by every manufacturer and distributor a tax at the rate of $4.95 per gallon.

(c) The tax rate provided in paragraph (b) shall not apply:

1.To alcoholic beverages manufactured in states, territories, or countries which impose discriminatory taxes or

alcoholic beverages manufactured or bottled outside of their boundaries;

2.To alcoholic beverages manufactured or bottled in states, territories, or countries which provide agricultural price supports or other economic incentives or advantages exclusively for alcoholic beverages produced within their boundaries; or

3.To alcoholic beverages manufactured or bottled in states, territories, or countries which provide export subsidies for agricultural products used in making said alcoholic beverages.

Those beverages shall be taxed at the rate set forth in paragraph (a).

(3) The use of the words "and vendor" in paragraphs (1)(a) and (2)(a) shall not be construed as imposing a new excise tax based upon sale at retail, but shall only be construed as applying the increase in tax rates to vendors' inventories of stock on June 1, 1968.

(4) The excise taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(5) For the months of July and August every year the tax rate for products specified in paragraph 9(1)(b) will be $6.50 per gallon and the tax rate for the products specified in (2)(b) will be $9.53 per gallon. Thereafter the tax rate for the products in paragraph (1)(b) and in paragraph (2)(b) will be determined in paragraph (6).

(6) By the 20th of each month (hereinafter, the time of calculation) commencing August 20, 1985, the Department of Business Regulation shall determine the increase or decrease in the sale of alcoholic beverage gallonage taxed at the rates provided in paragraph (1)(b) or paragraph (2)(b) for the prior month in comparison to that month of the year before. If that gallonage has increased, the percentage amount of said increase in excess of 5

percent shall be the percentage increase in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following the "time of calculation." If the gallonage has decreased, the percentage amount of said decrease in the tax rates provided in paragraph (1)(b) or paragraph (2)(b) for the gallonage sales for the month following "the time of calculation." However, the tax rate provided in paragraph (1)(b) shall not decrease below $4.35 per gallon or increase above $6.50 per gallon, dn the tax rate provide din paragraph (2)(b) shall not decrease below $4.95 per gallon or increase above $9.53 per gallon.

(7) By the 25th of each month, the Department of Business Regulation shall notify all distributors in the state of the new tax rates applicable for the following month base don subsection (6).

(8) All revenue collected pursuant to subsections (9) and (10) shall go directly to the Department of Business Regulation to provide funds to administer the provisions contained herein.

(9) Any manufacturer or importer applying for the tax rate provide din paragraph (1)(b) or paragraph (2)(b) shall apply for that rate between July 1 and July 31 of each year and shall pay a nonrefundable application fee of $5,000. The department shall adopt appropriate rules of practice and procedure to establish a method of qualification for affected parties.

(10) Each manufacturer authorized to do business under the tax rates imposed under paragraph (1)(b) or paragraph (2)(b) shall pay an annual license fee of $3,000, plus travel expenses of the Department of Business Regulation to audit the manufacturer's records. Each qualifying applicant shall report monthly the source of raw materials used to manufacture the products eligible for the tax rates provided in paragraphs (1)(b) and (2)(b).

FLORIDA SENATE BILL S.B. 1326
(Enrolled as Chapter 88-308 on July 7, 1988)

* * * *

Section 9. Effective July 1, 1988, the Legislature finds and determines that the authorized transportation and importation into the state of alcoholic beverages described in chapters 564 and 565, Florida Statutes, require strict enforcement of state statutes regulating and administering the manufacture, distribution and sale of alcoholic beverages; the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported; the production of lower quality alcoholic beverages should be discouraged; and in order to protect the health, safety, welfare and economic integrity of the state, the costs of ensuring compliance with relevant state laws should be included in the taxes imposed upon said alcoholic beverages.

Section 10. (1) Effective July 1, 1988, section 564.06, Florida Statutes, is amended to read:

564.06 Excise and import taxes on wines and beverages.–

(1)(a) As to beverages including wines, except natural sparkling wines and malt beverages, containing 0.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, there shall be paid by all manufacturers and distributors a tax at the rate of $.25 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all beverages including wines, except natural sparkling wines and malt beverages, containing 9.5 percent or more alcohol by volume and less than 17.259 percent alcohol by volume, an import tax in the amount of $2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, there shall be paid by manufacturers and distributors a tax at the rate of $.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of all wines, except natural sparkling wines, containing 17.259 percent or more alcohol by volume, an import tax in the amount of $2.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3)(a) As to natural sparkling wines, there shall be paid by all manufacturers and distributors a tax at the rate of $1.50 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of natural sparkling wines an import tax in the amount of $2.00 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(4)(a) As to wine coolers, which are a combination of wines containing 0.5 percent or more alcohol by volume, carbonated water, and flavors or fruit juices and preservatives and which contain 1 to 6 percent alcohol content by volume, there shall be paid

by all manufacturers and distributors a tax at the rate of $.75 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of wine coolers as described in paragraph (a) an import tax in the amount of $1.50 per gallon to be paid by manufacturers and distributors.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(5) Wine used by any established church as sacramental wine or in connection with religious services is hereby expressly exempted from the provisions of this section.

(6) Every distributor selling wine within the state shall pay the tax to the division monthly on or before the 10th day of the following month, less 1.9 percent of the tax due, which shall be withheld by the distributor for keeping prescribed records, furnishing bond, and properly accounting for and remitting taxes due to the state. However, no allowance shall be granted or permitted when the tax is delinquent at the time of payment.

(7) All beverages taxed under paragraphs (1)(a), (2)(a), (3)(a), or (4)(a) and manufactured within this state for sale in this state, if fortified, shall be fortified with alcohol, except for flavoring extracts, distilled above 185 proof from produce of agricultural land inspected by Florida agricultural inspectors. All wines taxed under paragraphs (1)(a), (2)(a), (3)(a) or (4)(a) and manufactured within this state for sale in the state shall be made of produce from land inspected by Florida agricultural inspectors.

(8) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(9) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 564.06, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s. 564.06, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 11. (1) Effective July 1, 1988, section 565.12, Florida Statutes, is amended to read:

565.12 Excise and import tax on liquors and beverages.–

(1)(a) As to beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, except wines, there shall be paid by every manufacturer and distributor a tax at the rate of $4.75 per gallon. As to beverages containing less than 17.259 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate provided in chapter 564.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing 17.259 percent or more of alcohol by volume and not more than 55.780 percent of alcohol by volume, an import tax in the amount of $1.75 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(2)(a) As to beverages containing more than 55.780 percent of alcohol by volume, there shall be paid by every manufacturer and distributor a tax at the rate of $5.95 per gallon.

(b) In addition to the tax imposed under paragraph (a), there shall be imposed upon the importation into this state of beverages containing more than 55.780 percent of alcohol by volume, an import tax in the amount of $3.58 per gallon to be paid by every manufacturer and distributor.

(c) The taxes imposed under paragraphs (a) and (b) shall be paid together in order to facilitate the collection of these taxes and to ensure that these taxes will only be collected once in accordance with s. 561.50.

(3) The excise and import taxes required to be paid by this section are not required to be paid upon any alcoholic beverage sold to a post exchange, ship service store, or base exchange located in a military, naval, or air force reservation within this state.

(4) All beverages distilled in this state for sale in this state shall be distilled above 185 proof, except for flavoring extracts, of produce from land inspected by Florida agricultural inspectors.

(5) The department is authorized to promulgate rules to effectuate the provisions of this section.

(2) It is the legislative intent that if any amendatory provision of this section is held invalid by an interlocutory decree, while in effect, or final decree or order of a court of competent jurisdiction, the provisions of s. 565.12, Florida Statutes, as it existed on the day prior to the effective date of this section, shall then be revived and shall be the law of this state, except as to such provisions of s.

565.12, Florida Statutes, which have heretofore been held unconstitutional by the Florida Supreme Court, and except that any amendments to such section enacted other than by this section shall be preserved and continue to operate to the extent that such amendments are not dependent upon the portions of said section which expire pursuant to the provisions of this section.

Section 12. In the event that a court of competent jurisdiction determines any of the provisions of s. 564.06 or s. 565.12 as amended by this act to be unconstitutional, it is the intent of the legislature that the amendments to s. 564.06 and s. 565.12 contained in this act shall be null and void and that those sections revert to the language existing in said sections on June 30, 1988.

* * * *

§215.26 Repayment of funds paid into state treasury through error, etc.

(1) The comptroller of the state may refund to the person who paid same, or his heirs, personal representatives or assigns, any moneys paid into the state treasury which constitute:

(a) An overpayment of any tax, license or account due;

(b) A payment where no tax, license or account is due; and

(c) Any payment made into the state treasury in error;

and if any such payment has been credited to an appropriation, such appropriation shall at the time of making any such refund, be charged therewith. There are appropriated from the proper respective funds from time to time such sums as may be necessary for such refunds.

(2) Application for refunds as provided by this section shall be filed with the Comptroller, except as otherwise provided herein, within 3 years after the right to such refund shall have accrued else such right shall be barred. The Comptroller may delegate the authority to accept an application for refund to any state agency vested by law with the responsibility for the collection of any tax, license, or account due. Such application for refund shall be on a form approved by the Comptroller and shall be supplemented with such additional proof as the Comptroller deems necessary to establish such claim; provided, such claim is not otherwise barred under the laws of this state. Upon receipt of an application for refund, the state agency to which the funds were paid shall make a determination of the amount due. If an application for refund is denied, in whole or in part, such state agency shall so notify the applicant stating the reasons therefor. Upon approval of an application for refund, such state agency shall furnish the Comptroller with a properly executed voucher authorizing payment.

(3) No refund of moneys referred to in this section shall be made of an amount which is less than one dollar, except upon application.

(4) This section is the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.

(5) When a taxpayer has pursued administrative remedies before the Department of Revenue pursuant to s. 213.21 and has failed to comply with the time limitations and conditions provided in s. 72.011 and s. 120.575, a claim of refund under subsection (1) shall be denied by the Comptroller. However, the Comptroller may entertain a claim for refund under this subsection when the taxpayer demonstrates that his failure to pursue remedies under chapter 72 was not due to neglect or for the purpose of delaying payment of lawfully imposed taxes and can demonstrate reasonable cause for such failure.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
THE JOHNS BUILDING
725 SOUTH BRONOUGH STREET
TALLAHASSEE, FLORIDA 32399-1000

Bob Martinez, Governor
Van B. Poole, Secretary

MEMORANDUM:

TO: Joe Spicola, General Counsel, Office of the Governor

FROM: Van B. Poole, Secretary

DATE: June 20, 1988

Prior to the 1988 legislative session, a workshop meeting was held with industry representatives to discuss the Department's proposed legislation and to elicit their pledge not to add amendments to our bill. However, notwithstanding their pledge not to amend the bill, numerous amendments were added prior to the bill's passage.

After thoroughly reviewing CS for SB 1326, I believe a veto should be considered as the bill does not serve the public interest. It contains a number of controversial issues added as amendments which concern the Department:

1. An exclusive territorial sales amendment for malt beverage distributors helps to protect business investment which enhances the state's position as relates to tax collection. However, it also disallows situations where an individual retail vendor may go to any distributor in the state and seek the lowest price being offered. Also certain retail chains and pool buying groups object to this amendment.

2. A Viticulture Trust Fund amendment diverts an estimated $225,000.00 of tax monies from general revenue to the Department of Agriculture for viticultural research.

3. An importation tax amendment that [sic] does not meet general industry needs. According to our records, this provision would grant three alcohol beverage producers located in Florida a 3.2 million dollar tax exemption on their products sold in Florida which are manufactured and/or distilled from state grown produce.

Joe Spicola
Page Two
June 20, 1988

From a legal point of view, it is our opinion that the import tax formula contained within the bill runs afoul of the Commerce Clause of the United States Constitution and is not salvaged by the Twenty-first amendment. A saving clause (or reverter clause) is provided which may or may not actually provide for a return to the taxing formula as it presently exists. If the savings clause is not judicially approved, imported beverages would be taxed at the low excise tax rate which would have a catastrophic impact on gross revenues estimated at a $111 million dollar decrease.

In addition, should this import tax become law it will be attacked in the courts and the Department of Business Regulation will face lengthy and costly litigation.

Under the proposed tax structure the cost to regulate domestic products will be greater than the cost to regulate imported products on a per gallon basis. This tax provision does not promote the efficient use of state government resources. Also, the bill does not provide an appropriation to properly implement its mandate. It is estimated that it will cost the Department $10,000 to implement this provision

Inasmuch as certain provisions appearing in CS/SB 1326 also were included in other bills that passed, those provisions listed below would survive a veto of CS/SB 1326.

a. The provision revising the method of labeling malt beverages with the designation "FLORIDA".

b. The provision for licensing certain 50 unit condominium/hotel/motel in Dade County.

c. The provision for licensing certain premises operated by sports arena authorities.

The practice of adding substantive amendments to a primary bill (creating a "train") vitiates the committee system of the legislative process, thereby depriving interested citizens the ability to fully understand an issue and provide recommendations to committee members that could improve the final bill product.

VBP/sjc
CC: Ms. Amy Baker, Director of Legislative Affairs

TRANSCRIPT OF HOUSE DEBATE
ON JUNE 7, 1988
(Index omitted in printing)

(p.1)

SPEAKER: Are we ready for Representative Meffert? Representative Gardner, are we ready on Representative Meffert's bill now? Okay.

Representative Gardner moves that we do take up Senate Bill 1326 without objection. Without objection show that motion passed. Read Senate Bill 1326.

CLERK: By the Committee on Commerce. Committee Substitute for Senate Bill 1326. A Bill to be entitled "An Act Relating to Alcoholic Beverages" amending section 561.19, Florida Statutes, providing additional criteria with respect to license issuance.

SPEAKER: Representative Meffert, do you wish to take up the first amendment at this time?

MEFFERT: Yes, Mr. Speaker. Do you want me to explain the bill first?

SPEAKER: You can, yes. Yes, go ahead, Representative Meffert, explain the bill.

MEFFERT: Well, this is the alcoholic beverage bill that modifies the procedure for licensing winners of alcoholic beverage quota licenses. It places more stringent (p.2) operational requirements on persons issued quota licenses after September 30th of this year. The requirements for notifying the Division of inactive licenses are clarified.

Beverage manufacturers and wholesalers will no longer be required to purchase permits for delivery vehicles.

Vendors will be required to purchase permits.

Warrantless searches of alcoholic beverage delivery vehicles will be permitted.

The definition of sold beverages which comports with the Department's present practice is placed in statutes.

The bill makes some changes in the manner in which malt beverage is packaged for sale in Florida, may be identified.

It includes a provision which provides excise tax relief for Florida producers of wine and liquor by eliminating a portion of the tax for all producers and reinstating the exact amount of the decrease in the form of an import tax.

The bill allows alcoholic beverage licenses for condominiums with at least 50 (p.3) units which are operated as public lodging establishments in certain home rule counties.

It adds sports arena's authorities to the provisions which allow civic centers to obtain alcoholic beverage licenses.

It contains a provision requiring exclusive territories for malt beverage distributors be established and honored.

It establishes and funds a viticulture trust fund for promotion of products manufactured from Florida-grown grapes and viti-cultural research.

There are amendments on the desk, Mr. Speaker.

SPEAKER: Representative Gardner.

GARDNER: Mr. Speaker, I would request, sir, that we temporarily pass Committee Substitute for Senate Bill 1326 for the purposes or for the purpose of taking up a resolution and ask the members to take their seats.

(DISCUSSION OF CS/SB 1326 TEMPORARILY SUSPENDED)

SPEAKER: Representative Meffert, we are on the first amendment or are you still (p.4) explaining?

MEFFERT: I finished the explanation, Mr. Speaker. We are ready to take up the amendments.

SPEAKER: Okay. Read the first amendment. Representative King, for what purpose?

KING: Inquiry of the chair, sir.

SPEAKER: Yes, sir.

KING: Mr. Speaker, this inquiry I don't know whether should come through you or should come through rules. But since I don't know which I'll go to you because you are up there and Mr. Gardner is down there.

But under the rules as I understand them 7.16 says that all general bills affecting revenues, expenditures or fiscal liability shall be accompanied by a fiscal note upon being reported out of financing tax or appropriation.

Mr. Speaker, I guess my question is if the rules are there, can I use them?

SPEAKER: Representative Gardner?

GARDNER: Sure.

KING: I guess, Mr. Gardner, I guess the question is, is there a note of fiscal (p.5) responsibility from either Mr. Young or from Mr. Bell's withdrawal from the Appropriations Committee of this particular bill?

GARDNER: The rules were waived when we took the bill up. That means all the rules get waived when you take the bill up.

KING: Sounds like a "gotcha" to me.

SPEAKER: Representative Silver.

SILVER: Inquiry of Mr. Gardner. I am not fully understanding what you just said. Maybe I am a little slow on this, but all rules are not available at all regarding this entire bill on all amendments and everything? Is that what you are saying?

GARDNER: No, I said we moved the rules be waived to take the bill up. Rules still apply with respect to germanity and anything else.

SILVER: Well, I don't understand then the response to Mr. King's question because Mr. King is making reference to a rule which is regarding not taking up the bill but having a fiscal note attached to that bill. So why do we waive that particular rule?

SPEAKER: Representative Gardner, if we (p.6) could temporarily pass this until we make determination on that request.

GARDNER: All right.

SPEAKER: Representative Gardner, are you prepared to make any comments?

GARDNER: Mr. Speaker, actually, I don't think an official point of order was called. I think there was really an inquiry made and we've had--I can tell you what the basis of our discussion has been.

Basically, we have a Senate bill that is accompanied by a Senate fiscal note. It was pulled into the Finance and Tax Committee and pulled into the Appropriations Committee and later the rules were

waived and it was withdrawn from both of those committees.

Now, if you look at Rule 7.16, next to the last paragraph, it says in the event of any bill of this nature being reported favorably by the Committee on Appropriations, Committee on Finance and Tax without fiscal note having been prepared it shall be the right of any member to raise a point of order on second reading and the Speaker may, in his discretion, order return of the bill to the (p.7) appropriate fiscal committee. A precedent was established under 7.16 in April of 1969, where the Speaker, Speaker Schultz, held a point raised by a Mr. D'Alembert was well taken. The Speaker, in the language of Rule 7.16, may in his discretion order return of the bill or joint resolution to the appropriate fiscal committee. The Speaker therefore exercised his discretion and ruled that Committee Substitute for House Bill 353 would not be rereferred and instead the House would continue its consideration of the bill.

SPEAKER: There is also a precedent 7.16(b), December 8, 1969, where the Senate bill pending a motion to adopt the amendment by the Committee on Appropriations, where a point of order was raised. The House had not been furnished fiscal notes stating the financial implications but reached the same conclusion.

If the point is called, it seems the controlling issue would be that discretion and it would seem like the discretion of the chair would be affected by the fact that a fiscal note was in fact available through the (p.8) Senate bill and in fact had been available to both committees of reference to which it had been referred and there had been motions to withdraw from those committees and that would be a basis upon which to exercise discretion although there is no stated requirement for the exercise of discretion. Representative Patchett?

PATCHETT: Mr. Speaker, if I might I was going to suggest that within the discretion of the chair the bill was referred to both Finance and Tax and Appropriations yesterday, withdrawn today,

in other words it had resided in those committees for 24 hours which they were to look at the fiscal impact and I presume that our staff took the Senate fiscal note and used that in their deliberations so in this particular case I think we have if not in letter of the rule complied but within the spirit of the rule complied and I would concur with what the Speaker just said.

SPEAKER: Representative King.

KING: Well, Mr. Speaker, since I did make this an inquiry rather than a point and, since Representative Gardner and several other (p.9) representatives have explained to me where we are, I will not make it a point, however, I would like one piece of clarification now, now that that has been said.

Is the Senate fiscal note to be assumed to be the fiscal note attached to this House bill?

SPEAKER: Representative Patchett?

PATCHETT: Mr. Speaker, it is my understanding that the fiscal note as part of the message from the Senate is in fact that thing that we're dealing on and I am, the point of the subject matter that I just discussed I am implying that yes, I believe that it is the fiscal note, it did reside in our staff, and therefore, it is the fiscal note which complies with 7.16.

SPEAKER: So for purposes of compliance, although I think the, if you are not calling a point then we don't have to rule on it but it is within the discretion of the chair to make that and all I stated for background purposes was the existence of the fiscal note, would aid in that discretion.

So, Representative Meffert, you have the (p.10) series of amendments?

MEFFERT: Yes, Mr. Speaker.

SPEAKER: Representative Jones.

JONES: Mr. Speaker, apparently either that point was withdrawn or ruled upon or whatever, but at that point I did want to raise a possible other point of order under 8.16 and basically this deals with the special order calendar as we previously had adopted it. It talks about all the bills that had been reported favorably to go in to the Rules Committee and yet clearly the citator show that House bill 1416 has been defeated in Committee so for that purposes it wouldn't appear that the companion bill to this Senate is in possession of the House during this special or extended session, if we're going to continue to follow the rules that we adopted when we went in to special session and for that purposes I can't see how we could go ahead and take up this bill at this time.

SPEAKER: Representative Gardner or Simon. Representative Simon.

SIMON: Yes. Mr. Speaker, not with reference to the point but with reference to (p.11) the calendar and the business we have here tonight and with reference to the fact that there appears to be a substantial number of amendments on the desk that would really have to be looked at if we are going to expeditiously move through debate. I'm wondering if perhaps it might not be appropriate to temporarily pass this so we have an opportunity to review a couple of these amendments and perhaps review some of these points of order and then come back at whatever time, however long it takes to do that and more expeditiously then move through the process.

SPEAKER: Representative Gardner.

GARDNER: On Mr. Jones' point. This bill came over in messages after we had gone into extended session. There was a motion made to take the bill up instanter and frankly it passed without objection. It was immediately drawn in to the Appropriations Committee and the Finance and Tax Committee and that was, I

believe, yesterday, and then today it was withdrawn from those two committees and once again, we moved to waive the rules to make it up and that passed and that's where we are.

(p.12)

SPEAKER: While we are wandering around here I thought I would inform the House that since we are going to be in and out all evening we have arranged for food to be brought in, so you will be able to sustain your existence here.

Representative Meffert?

MEFFERT: I think we're ready to start the amendatory process but every time I offer one somebody jumps up, so we can see who jumps now.

SPEAKER: Okay, read the first amendment.

CLERK: Representative Meffert offered the following amendment on page 31, lines 20 through 26, strike all language and insert. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative Meffert.

MEFFERT: This removes the Senate language regarding retailer shipments between wholesalers' territories.

SPEAKER: Is there debate?

Representative Silver?

SILVER: Mr. Speaker, I'm wondering on this bill since it's obviously a very (p.13) interesting one and I certainly would want to make sure everybody knew what they were voting on, if we could get some order because I could not hear the reading clerk even read the amendments on it. I do not know what's going on.

SPEAKER: Representative Meffert?

MEFFERT: I just explained the amendment. If there is no question or I'll answer questions, whatever is the pleasure of the House.

SPEAKER: Are there questions on the amendment?

Representative Rudd.

RUDD: Mr. Speaker, I believe Mr. Meffert is mumbling a little bit. I couldn't hear what he said.

MEFFERT: Well, sir, I had explained what this amendment does is it removes Senate language that, regarding retailer shipments between wholesalers' territories. This is a transshipment issue and we're taking that out of this bill. This is solely between beer wholesalers.

SPEAKER: All those in favor of the motion (p.14) signify by saying aye. (Aye). Opposed, no. (Silence). Show that adopted. Read the next amendment.

CLERK: Representative Meffert offered the following amendment. On page 10, lines 2 through 6 strike "all such beverages shall also have".

MEFFERT: This deletes language that Senate put on regarding a freshness expiration date with regard to malt beverages.

SPEAKER: Questions? Representative Lombard? Oh, sorry.

All those in favor signify by saying aye. (Aye). Opposed, no. (Silence) Show it adopted. Read the next amendment.

CLERK: Representative Meffert offered the following amendment. On page 11, line 26 strike "and all malt beverages" and insert. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative Meffert.

MEFFERT: This clarifies that the import tax will not be imposed on malt beverage products. The Senate had put that in then took it out but didn't take it out in all places, so we're deleting the last reference.

(p.15)

SPEAKER: Is there debate?

Representative King?

KING: Just for clarification. What this does now is take beer out, is that what it does?

MEFFERT: Well, Mr. King, as the Senate bill came over beer is half in and half out and so this takes the other half out that they attempted to take out but didn't take out when they took the other half out so we're going to take it all out instead of half in.

KING: Don't suppose you'd like to have the other half in, would you?

MEFFERT: No, thank you, I know you've got an amendment to do that and we don't favor it then or now.

SPEAKER: Is there debate on that? Those in favor signify by saying aye. (Aye). Opposed, no. (Silence). Show it adopted. Read the next amendment.

CLERK: Representative Meffert offered the following title amendment. On page 1, line 17---

SPEAKER: Show the title amendment adopted without objection. Read the next (p.16) amendment.

CLERK: Representative King offered the (p.17) following amendment. On page 11, line 17 through page 27, line 9, strike all of said lines and renumber subsequent sections.

SPEAKER: I show another amendment in there, is that before Representative King's?

Representative Meffert, do you---?

MEFFERT: Yes, she's found my effective date amendment if she could read it instead of, before she reads Mr. King's?

SPEAKER: Okay, let's take that one then we'll take Representative King's.

CLERK: Representative Meffert offered the following amendment. On page 30, line 19, strike all language and insert. Section 13. Effective upon this act becoming a law, section 563.021 Florida Statutes is. . ." Reading of the amendment, Mr. Speaker.

MEFFERT: That's an effective date amendment regarding the malt beverage territorial amendment.

SPEAKER: Show that adopted without objection. Read the next amendment.

CLERK: Representative King offered the (p.17) following amendment. On page 11, line 17 through page 27, line 9, strike all of said lines and renumber subsequent sections. Reading of the amendment, Mr. Speaker.

SPEAKER: Representative King

KING: Thank you, Mr. Speaker. Quite frankly, members, here is the only portion of this bill that I oppose. And I am going to tell you very quickly, because I know part of the script calls to lay me on the table. And I know, or at least I sense that I know that I'm going to have a whipping coming, but before I have that whipping, I'm going to have my say and so here we go.

What we've got, what we have right here is a bill that we have passed four years ago, basically, just as it has been worded and four years ago, between now--between then and now, that bill was ruled unconstitutional. The Supreme Court, in the response to the constitutionality challenge, gave this one particular distiller, and that's what we're talking about here, we are talking about a tax advantage for one particular distiller, in one particular county, that if we enact it, (p.18) will amount to over $4 million a year coming directly from your general revenues. In addition, if we enact this bill, the long-term down stroke according to the very fiscal notes that we have been instructed are to be considered fiscally attached to this amendment, to this bill, is $111 million.

Now, members, all I ask is this--when you all sat here through the appropriation process and watched the thumbs up and watched the thumbs down and were told time and time again that we as a state could not afford to do the things that we were doing. Does it not strike you as being a little bizarre, perhaps even a little blatant, that in the final waning moments of this session, when all of us are tired, when all of us would love to go home, in comes from the Senate a turkey the size of the one that ate Chicago.

Now, while all of us were being told that we couldn't have our appropriations because the state could not afford it, we are now being asked to pass a bill that favors one distillery in this state, gives them another opportunity to go through the constitutionality (p.19) process again, they've just done it. In February, the Supreme Court ruled against this very same piece of legislation. Why, you say, are we now

considering again if the Supreme Court ruled? I'll tell you why, because it takes four years to come back through it and in those four years, this one distiller, in this one county, will have over $12 million of Florida's general revenue money, your general revenue money.

And members, we're not talking about the legislation or the legislators giving this distiller a leg up. We're talking about the little people. We're talking about Representative Jamerson's low-cost housing. We're talking about Representative Mortham's school bus. We're talking about all of your people that you've wanted so desperately to bring money to, not getting a chance because we give one let up to one particular distiller in this state when it's already been proven unconstitutional.

I'd just like to say this one thing. Those who have been here know me as a businessman. Quite frankly, I consider myself a (p.20) damn good one. Now, let me tell you something. I don't mind competitive advantage if it's earned. I don't mind the competitive advantage of a better process, a better product, a better market, a better technique. But I am totally diametrically opposed to a competitive advantage that's going to be granted, legislatively, to a county to one distiller. That's not fair. It's blatantly wrong. It's been orchestrated to come at a particular time when we are at our all-time lowest.

I would urge you very, very strongly to please pass this amendment which keeps the rest of the bill whole, but just takes out the one odious portion of favoritism to one county that's unconstitutional.

SPEAKER: Representative Hargrett.

HARGRETT: Question of Mr. Meffert.

SPEAKER: He yields.

HARGRETT: Mr. Meffert, after having listened to that very emotional outpouring by Representative King, I just wanted to make

sure I understood really what we are doing. I understand--I think I understand, if you believe as Representative King believes, why (p.21) you could get emotional. But, as you know, Mr. Meffert, I've been sort of a leader in this legislature in trying to promote a wine industry, having studied the methods that have been used by other states as we learned that California had a raisin board that provided the leadership and now they have one of the leading wine industries in the world.

New York State created legislation that fostered good wine, good practices and some incubator legislation that enabled its wine industry to grow. Many other states have taken the same approach.

The question I have, and further as you know these efforts to create industry are all about creating jobs in Florida. Now the question that I have on this issue is since we are creating this legislation, if any other manufacturer locates in Florida and makes products--makes its products from Florida ingredients, will they also qualify for this, even if they were in another county in Florida?

MEFFERT: Mr. Hargrett, my understanding is yes, it does, and I, too, take issue with the comments made by the gentleman from (p.22) Jacksonville because it does, if they meet this standard, which is a requirement, the way it's written if it involves the use of Florida grown products, it involves producing in Florida and many states have promotional items for various things whether agricultural or manufactured in their states and, frankly, I wish at this point we could go further in promoting our own Florida products and those people who locate and furnish jobs in this state and who are very important and furnish these economic benefits. But there are problems with doing that, but other states have successfully done promotions of Florida [sic] products and I wish that we went further than we even go in this bill.

SPEAKER: The question recurs in the adoption of the amendments offered by Representative King. All those in favor signify by saying aye. (Aye). Opposed, no. (No). Fails. Read the next amendment.

CLERK: Representative Messersmith offered the following amendment. On the line following the enacting clause, insert new section 1. "Section l. Subsection 6 of (p.23) section 210.02 Florida Statutes is amended to read. . ."

SPEAKER: Representative Messersmith.

MESSERSMITH: Thank you, Mr. Speaker. This amendment just provides for those cigarette wholesalers an additional six months in which they can pay for, or--I'm sorry, I can't talk, I lost my voice--the tax credit they get on damaged cigarettes.

SPEAKER: Representative Silver.

SILVER: Mr. Speaker, I would raise a point of order pursuant to 11.8.

SPEAKER: 11.8. Representative Gardner.

GARDNER: Why don't we pass over this amendment. Let me have a chance to look at it. We'll go to the next amendment.

SPEAKER: Show the amendment temporarily passed. Read the next amendment.

CLERK: Representative Messersmith offered the following amendment. On the line following the enacting clause, insert new section 1. "Section 1. Section 210.11 Florida Statutes is amended to read. . ."

SPEAKER: Representative Messersmith.

MESSERSMITH: Thank you, Mr. Speaker. (p. 24) This amendment allows the department to collect an interest rate on delinquent taxes.

SPEAKER: Representative Meffert.

MEFFERT: Yeah, this would codify a practice of the department and it's fine, there's no problem with it. It's noncontroversial.

SPEAKER: Is there debate? Is there objection? If not, show it adopted without objection. Read the next amendment.

CLERK: Representative Messersmith offered the following title amendment. On page 1, line 2, strike "alcoholic beverages" and insert "regulated activities amending section 210.11."

SPEAKER: Show the title amendment adopted without objection. Yes, ask that. That's a reasonable question. Is that title amendment to the second amendment or the first amendment? Second amendment. Okay. That's the right one. Read the next amendment.

CLERK: Representative Silver offered the following amendment. On page 27, line 9, after the period, insert section 12. "In the (p.25) event of the provisions. . ."

SPEAKER: Representative Silver.

SILVER: Thank you, Mr. Speaker. Ladies and gentlemen of the House--- This is the one on page 27, line 9, is that the one? Okay.

This is probably going to refer back a little bit to what Representative King brought out in his argument on his previous

amendment. But what the essence of this amendment will do is to put everyone in a status quo situation if and when this bill passes. On closing argument I will get into the constitutionality of this, but what would be sufficient for right now to suggest to you that one of the reasons why this bill is being offered it has been rumored, is for a competitive advantage. The court, as Mr. King stated before, has ruled that this type of statute is unconstitutional. What my amendment seeks to do is if everybody is going ahead in good faith, that all we will do is leave things at the status quo.

If the case is challenged in court, the amendment states that it is the intent of this legislature that a court enjoin the effective date of such sections until such time as final (p.26) adjudication of the constitutional challenge is made by the court of last resort. So in other words, nobody will have an advantage, nobody will lose anything, and the court will have an opportunity to decide the case on the merits, and the effective date will be postponed.

I think, and I have offered this as a solution before as an adequate measure if everybody is operating in good faith. If somebody wants to take advantage of this as it is rumored to be, then you obviously will vote against this amendment and substantiate that theory. I would move the amendment.

SPEAKER: Representative Simon.

SIMON: Mr. Speaker, I move a substitute amendment. It will be the first amendment that bears my name.

SPEAKER: Okay, read the Simon substitute.

CLERK: Representative Simon offered the following amendment on page 11, line 3 through page 27, line 9, strike all of said lines.

SPEAKER: Representative Simon.

(p.27)

SIMON: Yes, if I may. Ladies and gentlemen, you just heard an explanation from Representative Silver and I'm going to use the exact words. You heard an explanation from Representative Silver of what his amendment seeks to do. His amendment is about five lines long. It seeks to do what it is Representative Silver represents that it seeks to do. Unfortunately, it don't do that. And don't do anything. There is a right way and a wrong way to do what Representative Silver would like to do.

The right way to do it is a bit more complicated, and requires a more lengthy amendment.

Representative Silver's amendment has no legal force of effect whatsoever. What it says is, in the event that provisions of the act are challenged by any court, it is the intention of the legislature that a court enjoin the effective date. That means nothing. It means the court might do it. It means the court might not do it. It is purely and entirely discretionary with the court which means it is of no legal force and effect.

(p.28)

Now, conversely, in the event that one could construe Representative Silver's amendment differently, in the event one could construe Representative Silver's amendment as a mandate to the court to file some type of an injunction in the event that the case is challenged, then his amendment is likewise unconstitutional because it interferes clearly and obviously with the separation of powers doctrine inasmuch as injunctions are a matter solely within the purview of the court and we cannot dictate when a court enters an injunction.

What we have done with this amendment I'm offering as a substitute is really an attempt to get us to where we need to be relative to the constitutional question. We have inserted what's known as a failsafe provision. The failsafe provision in effect says that if there is a challenge and an order is entered, if it's either a preliminary order or a

final decree, if any preliminary injunction or final decree is entered by the court, then the law would revert back to the law as it previously existed before this new (p.29) provision went into effect. That is the right way to protect the interests of the State against a challenge of constitutionality.

In other words, if the bill passes with this amendment on it, there certainly will be a constitutional challenge. I don't think anyone denies that. But what we're saying with this amendment is the court could then at its discretion enter an injunction. If the court enters that injunction, then the law of the State of Florida reverts back automatically to the law that existed before we made the changes with this new statute. I have to tell you constitutionally that is the right way to go where Representative Silver wants to be.

Now to even perfect it more, Representative Jones has a couple of technical amendments to the amendment which will put us in a posture which I think will give us the strongest possible constitutional position to preserve the interests of the State upon passage of this law, and I would yield to Representative Jones for purposes of the amendments to the amendment.

SPEAKER: Read the amendment to the (p.30) amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. On page 5 line 11, strike "from fresh fruit" and insert "of produce. . ."

SPEAKER: Representative Jones on the amendment to the amendment.

JONES: As has been pointed out there is a constitutional issue involved in the whole round. Our whole-hearted effort here is to protect something that's been in Florida for some 27 years. It was

first granted to Old Florida Rum. And we have been using Florida raw materials to make alcohol now for yea these many years. Constitutionally, we are pursuing the concept that is being used in Georgia, and we're addressing agricultural products grown on land inspected by Florida agricultural inspectors to clarify what we're doing, and that's the thrust of this amendment. I would urge you to adopt my amendment to Mr. Simon's amendment.

Move the amendment, Mr. Speaker.

SPEAKER: Questions of the amendment? (p.31) Debate on the amendment to the amendment? Objection to the amendment to the amendment? Without objection show the amendment to the amendment adopted. On the amendment as amended. On the next amendment, read the next amendment to the amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. (p.32) On page 5, lines 7 and 8, strike all . . .

SPEAKER: Representative Jones, you're recognized.

JONES: This is the same language in another section of the bill. Agricultural land inspected by Florida agricultural inspectors. I move the amendment.

SPEAKER: Is there objection to the amendment to the amendment to the substitute amendment? Without objection show the amendment to the substitute amendment adopted. Read the next amendment to the substitute amendment.

CLERK: Representative C.F. Jones offered the following amendment to the amendment offered by Representative Simon. (p. 32) On page 15, lines 19 and 20, strike all.

SPEAKER: Representative Jones on the amendment to the substitute amendment.

JONES: "of produce from land inspected by Florida agricultural inspectors" in another section.

SPEAKER: Are there questions on the amendment to the substituted amendment? Is there debate? Representative Rudd, for what purpose? A question of Representative Jones. Representative Jones yields to a question by Representative Rudd.

RUDD: Mr. Jones, if another state wanted to sell a product to this particular company we're talking about, could they make an arrangement to have that product inspected by a state inspector of the State of Florida and then have it shipped therein, into the state?

JONES: We're speaking of produce from land inspected by Florida agricultural inspectors. Florida agricultural inspectors do not inspect land in other states.

RUDD: I want to know about special arrangement, if it were to that state's (p.33) advantage to move their product to our area, could that arrangement be made?

JONES: It's got to be growing in Florida on Florida land inspected by Florida inspectors and you don't do that in other states.

SPEAKER: Further questions, is there further debate? Is there objection to the amendment to the substitute amendment? Without objection, show the amendment to the substitute amendment adopted. Now we're--is there objection? All those in favor of the amendment to the substitute amendment, Representative Messersmith for what purpose?

MESSERSMITH: Mr. Speaker, I think we should send a Sergeant of Arms up to remove Representative Hodges from the

gallery when he needs to be down here doing the peoples' business.

SPEAKER: The Speaker does not see Representative Hodges. Now on the substitute amendment as amended Representative Simon to close on the substitute amendment as amended. Representative Silver, do you have a question? Representative Simon on the (p.34) substitute amendment.

SIMON: Yes. Members of the House, this is a bill which by its very nature gives rise to constitutional questions. It deals with probably the most complicated and difficult area in American constitutional law, that being, state taxation of articles and activities in interstate and foreign commerce, further complicated by the fact that there is also a twenty-first amendment ramification.

It is an area that is extremely difficult. It is an area which is changing. It's an area that's very delicate. I have requested that this particular provision go on the bill in order to protect the state to the greatest extent humanly possible under the law as we now know it, against a constitutional challenge. By adopting this particular amendment we put the state into a position where, in the event the law cannot be sustained, the interests of the state and the tax that's being collected by the state will not be at risk. So this is a good amendment to protect the best interests of the state. I urge the members to adopt it.

(p.35)

SPEAKER: Representative Silver, since this will eliminate your amendment, you're recognized to close.

SILVER: Thank you, Mr. Speaker. Ladies and gentlemen of the House, I have a couple of comments on Representative Simon's statements. Number 1, I guess the first thing you say is, when you don't have anything good to say about something, you go and attack somebody, and I guess that's what has occurred in this instance.

Representative Simon said, and I bring to his attention--we both went to the same law school, and I don't know if Representative Simon knows this or not but I received the second highest grade in constitutional law at the University of Miami--but it seems to me, Representative Simon represents what people don't like about attorneys so much and that is that he tries to complicate things. I said mine--he attacks me for drafting an amendment in five lines where he attempts to take several pages to do it, so thusly, I think that people would understand mine a lot easier and a court would decide a lot easier than (p.36) Representative Simon's long duration and complicated method.

But the fact of the matter remains the same. Whether you adopt Representative Simon's amendment or you adopt mine, there is a constitutional question involved here. It's one that I would suggest to you that we not affect the revenue stream of the State of Florida, that if we don't adopt my amendment, we will do that, and thus I would urge the defeat of Representative Simon's amendment.

SPEAKER: So the question recurs on passage of the substitute amendment by Representative Simon. All those in favor of the substitute amendment, let it be known by saying aye. (Aye). All opposed, nay. (No). The substitute amendment passes.

Read the next amendment.

CLERK: Representative Simon offered the following title amendment on page 1, line 17 after. . .

SPEAKER: Title amendment without objection. Show the title amendment adopted. Read the next amendment.

CLERK: Representative C.F. Jones (p.37) offered the following amendment on page 14, line 29 and 30, strike all of said lines and insert "for sale in this state if. . ."

SPEAKER: Representative Jones.

JONES: What we're doing is putting this in two places. In the language that Mr. Simon has and in another section of the bill. We're doing the same wording that we had in the previous three amendments in another section of the bill. I would urge you to adopt these amendments.

SPEAKER: Are there questions on the amendment? Is there debate on the amendment? All those in favor of the amendment acknowledge by saying aye. (Aye). Opposed, nay. Amendment passes. Read the next amendment.

CLERK: Representative C.F. Jones offered the following amendment. On page 15, line 2 after "made," strike "from fresh fruit."

SPEAKER: Representative Jones.

JONES: Same amendment, Mr. Speaker, in another section.

SPEAKER: Are there questions on the amendment? Debate on the amendment? Objection (p.38) to the amendment? Without objection show the amendment adopted. Read the next amendment.

CLERK: Representative C.F. Jones offered the following amendment. On page 25, lines 5 and 6, strike all. . .

SPEAKER: Are there questions on the amendment? Is there debate on the amendment?

JONES: Move it.

SPEAKER: Is there objection to the amendment? Without objection. Without objection show the amendment adopted. Read the next amendment.

CLERK: Representative Silver offered the following amendment. On page 27, line 10, insert new section 12 and renumber subsequent sections. "Section 12. Paragraph 1 of. . ."

SPEAKER: Representative Silver on the amendment. You're recognized.

SILVER: Is it page 27, line 10? Mr. Speaker, ladies and gentlemen of the House, what this will do is reduce the licenses, it's a quota license amendment. Instead of having one for every 2500 people, provide for one every 6,000 people. What this will do will establish a uniform method of quotas (p.39) across the state. Right now we have some areas that have one in 5,000, one in 2,500, one in 4,000, whatever the case might be. What this seeks to do is establish one uniform method across the state, one for every 6,000 people.

SPEAKER: Representative Meffert. For what purpose?

MEFFERT: Mr. Speaker and members, I'd urge you to not adopt Representative Silver's amendment. What he's attempting to do here is on the floor to rewrite the number of quota licenses. This hasn't been in committee. We haven't had a chance to look to see what the effect of this would be, what impact it would have on various of your counties, but is a drastic change because it's almost two ~~and~~ a half times the number of population before a quote [sic] license would be issued. It's a substantial policy change and I have no way to explain to you the effect of any of you in your districts or anywhere else and its tremendous impact and I would urge a negative vote on the amendment.

SPEAKER: Representative Silver, do you (p.40) want to close on the amendment?

SILVER: No, I guess we could have a detailed analysis of the amendment as we've had on this bill as far as the financial impact is concerned, but I guess I will just use that in my closing argument, the argument of Representative Meffert, that he just used. Would urge the adoption of the amendment.

SPEAKER: So the question recurs on final passage of the amendment by Representative Silver. All those in favor let it be known by saying aye. (Aye). All those opposed, nay. (No). Amendment fails. Read the next amendment.

CLERK: Representative Simon offered the following amendment. On page 33, strikes lines 9 to 11, insert. "Section 18. Except as otherwise provided. . ."

SPEAKER: Representative Simon, you're recognized.

SIMON: Yes, this is just a technical amendment which conforms an effective date on the new section we put into the bill.

SPEAKER: Technical amendment without objection. Show the technical amendment by (p.41) Representative Simon adopted. Read the next amendment.

CLERK: Representatives Wise and Troxler offered the following amendment. On page 2, line 10, insert "Section 1. Section 847.013, Florida Statutes,. . ."

MEFFERT: Point of order, Mr. Speaker, on 11.8. This deals with obscene motion picture theaters and all kinds of things that's no way near germane to this bill.

SPEAKER: On the point, Representative Wise.

WISE: Mr. Speaker, tangentially, this effects the alcoholic establishment when they're serving alcohol and that's why we put the amendment on.

SPEAKER: On the point, Representative Gardner is going to look at the point. Let's temporarily pass this amendment while Representative Gardner looks at the point of order. Read the next amendment.

CLERK: Representative King offered the following amendment. On page 11, line 20, strike "and malt beverages" and insert nothing. Reading of the amendment, (p.42) Mr. Speaker.

SPEAKER: Representative King on the amendment.

KING: Thank you, Mr. Speaker. You know, people have filed by my chair and said how could you possibly have spoken so arduously against somebody who creates jobs, because in the original bill, with the original liquor distiller, we're talking about the protection supposedly of 300 jobs. Okay. Anticipating that that might have been an argument I came up with this other amendment, and basically what it says is this. If you believe that what we do for the one liquor distiller is fair, and if you believe that what we do for the few Florida wineries is fair as it relates to the protection of jobs and the creation of employment , then you'll love this one, because what it does is it says if we're going to do it for wine, and we're going to do it for liquor, then let's do it for beer. Yeah, let's do it for beer because, you see, Jacksonville has a brewery, Tampa has a brewery. Between those two breweries they employ over 3600 people.

Now, the original amendment drawn to the (p.43) liquor distiller is drawn on the basis that we are protecting jobs. I'm going to give you an opportunity to protect a bunch.

If you believe it's fair to do for this Florida distiller and the Florida wineries, then why not let's do it for the Florida brewers, and I move the amendment.

SPEAKER: Representative Meffert, you're recognized.

MEFFERT: Mr. Speaker, members of the House, you know, when--if Mr. King looked at our beverage laws he'd see exceptions to the tied house evil law that are held by the particular distiller in question, that they are the only distiller to my knowledge that has a retail alcoholic beverage license in this state. They have not been treated shabbily at all and yes, we have encouraged, we tried to encourage Miller's to locate their brewery in Florida, but they went over the line. That was their choice. That goes back to your argument about businesses, Mr. King, and being a businessman.

The fact of the matter is that we have all through these laws and not only here, the (p.44) premium tax ought to be fairly near to where you live, with domestic insurers versus out-of-state insurers. It's not uncommon for this legislature to consider those people and their economic impacts that they have in various ways and various parts of the state.

To my knowledge, Anheuser Busch has not sought this amendment, in fact, this was a part of the Senate bill at one point and they took it out. We finished doing that on our earlier amendment that I pointed out. The fact of the matter is we don't need to adopt this amendment and without talking on too long, I would just urge a negative vote on Mr. King's amendment.

SPEAKER: Representative Figg, for what purpose?

FIGG: For a question of the sponsor of the amendment. As I understand it, Mr. King, your amendment would prohibit importing

beer without a big tax on the little people about which we were speaking earlier, but that's beside the point.

I have an Anheuser Busch brewery in my district, too, in Tampa, Florida, and suppose (p.45) they wanted to import their own beer, would they have to pay, would we have to pay a tax on their imported beer but not their made-in-Florida beer? Well, my, my, my.

SPEAKER: Representative King, I recognize you to close on your amendment, and you can respond.

KING: Very, very quickly, Mr. Speaker, because you know, I can see that the troops are lined up and the salvos are heading my way but before I'm done, one last thing.

A past speaker of the House, when I first got elected to this office, in response to a question I asked to him about a vote, said, "Jim, you gotta dance with who brung you." Well, folks, the people who brung me are constituents in District 18, and they put me here under the basis that I promised that I would do the best that I could for them. And I really believe, or I wouldn't be speaking here, that what we are doing in this particular amendment, in this particular bill is wrong. I was against it from the start. But if you want to give a leg-up competitive advantage, then let's do it for wine, for (p.46)beer and for distilled spirits. Move the amendment, Mr. Speaker. Thank you.

SPEAKER: So, the question recurs on passage of the amendment by Representative King. All those in favor let it be known by saying aye. (Aye). All those opposed by saying nay. (No). And the amendment fails. Read the next amendment.

CLERK:. Representative King offered the following amendment. On page 11, line 27, strike "and malt beverages."

SPEAKER: Show that amendment withdrawn. Read the next amendment.

CLERK: Representative Lippman offered the following amendment. On the line following enacting clause insert "Section 1. Effective October 1st, 1989. . ."

SPEAKER: Representative Lippman, you're recognized.

LIPPMAN: Mr. Speaker, I believe you ought to temporarily pass that because it's on a point, the other point was. . .

SPEAKER: Representative Meffert has the point of order on germanity as well on this particular point which we temporarily passed, (p.47) however, there are no other amendments.

SPEAKER: Representative Messersmith.

MESSERSMITH: Mr. Speaker, I was just going to say we have temporarily passed an amendment on a point of order which is. .

SPEAKER: We have two amendments on points of order, three amendments on points of order. Representative Silver.

SILVER: I--Mr. Speaker, I withdraw my point of order on the Messersmith amendment. I'm withdrawing my point of order on the Messersmith amendment.

MESSERSMITH: I know you are, but I just wanted to see if you had some work to do.

SPEAKER: Okay, in that case, Representative Messersmith, we are now on your amendment having shown the point of order by

Representative Silver withdrawn. So, would you like to discuss your amendment?

MESSERSMITH: Thank you, Mr. Speaker. I'd just like, you know, it's an amendment that allows wholesalers six more months in which to file for tax refund on damaged cigarettes.

SPEAKER: Is there debate? All those in favor signify by saying aye. (Aye). All (p.48) those opposed, no. (No). Show it adopted. Representative Meffert.

MEFFERT: I'm going to withdraw my point of order as to Mr. Lippman's amendment and I understand he'll withdraw his amendment if the point is withdrawn.

SPEAKER: Representative Meffert withdraws his point of order. Representative Lippman withdraws his amendment without objection and the title amendment. So, Representative Gardner, they're messing up your entire program here.

GARDNER: Well, I got to tell you, Mr. Speaker. I'm really disappointed. Because I thought we had one for the record books here, but that's the way it goes.

I guess I'm ready to give you a recommendation on the amendment by Representative Wise. The bill as it currently has been amended deals with the alcoholic beverage tax chapters of the Florida Statutes and it now deals with the tobacco tax section of the Florida Statutes. That's the 500 series in Chapter 210. The amendment deals with Chapter 847, so it's definitely a different (p.49) chapter. The bill deals with alcoholic beverage taxes and cigarette taxes. Chapter 847 deals with obscene literature and profanity. Now, the particular section that Representative Wise's amendment goes to deals with obscene performances, I guess, in establishments that serve alcoholic beverages and I would submit to you, sir, that it doesn't satisfy any of

the three legs of the stool, goes to a separate chapter, it's definitely a different subject, and it unduly expands the bill.

SPEAKER: So the chair will rule that the point is well taken since the amendment goes to a different chapter, different subject and unreasonably expands the purpose of the bill. There is one further title amendment by Representative Messersmith. Read that.

CLERK: Representative Messersmith offered the following title amendment on page 1, between lines 2 and 3 . . .

SPEAKER: Show that adopted without objection. Further amendments?

CLERK: None on the desk, Mr. Speaker.

SPEAKER: Representative Messersmith moves the rules be waived and Senate Bill 1326 (p.50) read a third time by title. Is there objection, is there objection, without objection, read it.

CLERK: By the Committee on Commerce, Committee Substitute for Senate Bill 1326, a bill to be entitled "An Act Relating to Alcoholic Beverages Amending Section 561.19 Florida Statutes."

SPEAKER: So the question --debate. Representative Silver.

SILVER: Speak against the bill for a brief moment, Mr. Speaker.

SPEAKER: You're recognized.

SILVER: Mr. Speaker, this bill is attempting to cure a problem that I know that Mr. Jones and Senator Crawford and others are concerned about. Senator Crawford is a personal friend. He's a good

senator, and he suggests to me that his purpose in doing this is to save substantial amount of jobs down in that particular area of the state. I am not objecting to the bill on the basis of what the motive is because I believe that's a good motive and I believe that is what Senator Crawford's motive is. But I am objecting (p.51) more to, I guess the procedure on this particular matter.

We have a financial statement here from the Senate Financial, fiscal impact statement, and I just want to tell you what it does because I think we're establishing a dangerous precedent or establishing a threshold here which has not been established before. Because both committees, F&T and Appropriations brought this bill into their committee yesterday, we never had a chance to discuss this bill before a committee, there was never a hearing before the F&T or Appropriations Committee. But listen to what the impact is on the people of Florida for this bill that's never been heard in the House. And this is from the Senate report.

If this amendment, and they're talking about the amendment which is the subject matter of this bill, if the amendment were to survive constitutional challenge, a tax break for $3.4 million dollars would be provided to Florida producers of alcoholic beverages from the general revenue fund.

If the impact [sic] tax is declared (p.52) unconstitutional, approximately $111.5 million dollars of 1988 to '89 general revenue monies would be at risk. Ladies and gentlemen, I would suggest to you, whenever you see a fiscal report like that, that at the very least you ought to have a hearing before a committee so that all the facts can be brought out. That is what is the problem here. We have a substantial impact that may or may not occur and what was going to happen is, if this law is declared unconstitutional, the Department of Revenue is going to have to go out and refund money to all these people that we are collecting these dollars from.

I would just suggest to you and I know Representative Simon is probably going to think this is worthless because it is coming out of my mouth, I would read to you as a quote from a court, that's a quote from a court, Representative Simon, it's not my quote, it's from the Florida Supreme Court, but you may not have any faith in them, either.

"When a state statute directly regulates or discriminates against interstate commerce or where its effect is to favor instate (p.53) economic interests over out-of-state interests, we have generally struck down the statue without further inquiry." Without further inquiry is what the Supreme Court said. That's how bad statutes such as this are.

So, ladies and gentlemen, I just want to make sure that when you vote you have all the facts before you. You now have all those facts, and there it is, and therefore I would ask you to defeat this bill.

SPEAKER: Representative Simon.

SIMON: Yes, ladies and gentlemen, Representative Silver has raised a real legitimate point relative to the bill and that is the question of constitutionality of this provision. As I explained earlier, the area of state taxation of articles and activities in interstate and foreign commerce is probably the most complex area and most difficult area in American constitutional law. It has been referred to in several United States' Supreme Court cases as "our perennial problem." Cases come up year after year after year.

We have had a number of cases which have stricken down other statutes. When those (p.54) cases have come up there was not a requirement to refund the money. That was not a problem at that time. There has been a similar case involving more recently a similar statute that was adopted by the State of Georgia. It was sustained by the Georgia Supreme Court and they attempted to go to the United States

Supreme Court, and the United States Supreme Court chose not to overturn that decision.

Consequently, I will not stand up before you and say with certainty that this new provision will withstand a constitutional challenge, nor will I stand up and state with you with certainty given the complexity of it that it will not withstand the constitutional challenge. It may be that Representative Silver is right when he says that it will not. It may be that I'm right when I say it will. In the final analysis, this is a matter which is going to court and the court will decide.

The risk to the state as enunciated in the fiscal note in the Senate was a potential risk to the state before we put on the failsafe amendment. Putting on that failsafe amendment has in my judgment eliminated any (p.55) possible exposure to the state in the event of a ruling of unconstitutionality. If we pass this law into effect on July 1, for sake of example, and if on July 2nd of this year or a year later or whenever there is a determination in any court that it is unconstitutional, we will immediately revert back to the previous law and there will not be a loss of even dollar one to the State of Florida. We have structured this complex question in the best possible manner to protect the interests of the state while at the same time trying to give an economic advantage to some extent to some industries that we have, agricultural industries in our state.

The State of Georgia has tried it. It was successful. It may not be to many people the most desirable way to deal with this problem, however, it's a very legitimate way to pursue this problem, and I say although some people might think it's constitutional, some people may think it's not, you've all heard me stand up before and say not to vote for a bill when it was a settled matter of constitutional law, that it was a violation. (p.56) And you've seen me do that on some bills that were politically very, very popular. But I don't care which way you fall out on this bill politically.

I'm not going to tell you this is a settled matter of constitutional law because it's not, and since it is not a settled matter of constitutional law, I would just suggest that you vote on the bill on its merits. If you think the substance of the bill is right, vote yes or let the courts decide. If the courts rule that we can't do it, there will be no risk of funds to the state. We've got it structured as well as we can given the circumstances.

Thank you.

SPEAKER: Representative Langton.

LANGTON: Thank you, Mr. Speaker. Ladies and gentlemen of the House, in opposition to the bill, very briefly.

We've given away under the guise of economic development $30 million dollars for a baseball stadium. We are now ready to give away another $111 million under the guise of economic development for the wine industry. (p.57) If we continue to operate as an economic redevelopment agency instead of a state government, we're not going to have any money to build roads, to build prisons or to operate schools which are the primary functions of state government, not to act as an economic development agency.

Please vote against this bill.

SPEAKER: Representative Hargrett.

HARGRETT: Speak in favor of the bill, Mr. Speaker. Ladies and gentlemen, what we have here is a measure that's designed to build an industry in Florida, to create job opportunities in areas where jobs are needed.

Now, one of the things I want you to take note of, we've had a freeze line in this state that's been moving further south. You know, you used to be able to grow citrus up in, as far as Lake County. And that, every year, when we have these freezes we freeze out these

groves and you know it takes about seven years or more to get a new grove producing. Well, a lot of these families that were growing citrus have gotten up in age and they just, it just takes too long, and so these grove (p.58) lands have been abandoned and it's had an impact on the economy of large sections of our state. What this bill does is encourage new agricultural crops that can grow in these areas, grapes and other crops that will withstand cold.

In addition to the agricultural encouragement, what we are talking about is creating an industry in Florida that's one of the largest industries in the world, that is, producing wine and spirits, and so for somebody to say that this is a giveaway program and equate it with spending something on a baseball stadium is just patently wrong. It's not a giveaway program, it's a program that's been successfully operated in a lot of states where they protected their industries; their infant industries, allowed them to grow, create jobs and economic development, then the multiplier effect of all the taxes that are paid by the workers. And so, ladies and gentlemen, we have an opportunity here to foster good solid economic development not only in the manufacturing area, but in the agricultural area as well. And I can think of (p.59) no better way to foster growth in certain parts of Florida, especially the central Florida area.

I urge you to support this good bill. We've done it before. We had a problem and we're here to correct the problem, and I urge you to support the good bill.

SPEAKER: Representative King.

KING: Very, very, quickly. You know, ladies and gentlemen of the House, my newspaper, up there, have written correctly three separate articles about this particular bill. You know, and what they've said is, tongue in cheek, they've said there's no way that the House of Representatives is going to stand in the way of this bill. That the steamroller is rolling, and we're going to just acquiesce and off we'll go.

Well, folks, I want to go back to Jacksonville, in a matter of hours, hopefully, and face my opponent as each of you will face your opponents and be able to look him in the eye and say I voted as correctly as I knew how to vote as often as I voted. And the point that bothers me about this, I've made some (p.60) bad votes before, I'm sure, but they were errors of omission, not commission. In the waning hours of the session, when everybody is tired is not a good time to take up a bill that has a potential, Mr. Simon, a potential $111 million negative revenue stream to this state.

Now all I'm telling you is this. Now, you can go along with the flow and you can follow the script if there is one, I don't know there is. No scripts. You can go on with -- scratch script -- you can go and vote your conscience, and I hope that when you vote your conscience, you'll recognize that what we're doing every time we do it makes it more possible and probable that we're going to do it again, and again, and again.

Right is to vote against this bill because it's right for the people of this state.

Thank you.

SPEAKER: Representative Jones.

JONES: Thank you, Mr. Speaker. Now, when Duval County wanted some help with the insurance industry, I followed the script. I (p.61) stayed with you, honey, and there's no difference. You got a lot of jobs up there as a result of that and I submit to you that the 300 jobs in Polk County that this represents, that's been there for 27 years, means a lot to me and I'm asking you to help me out. I hope that's clear.

SPEAKER: Representative Martin.

MARTIN: Mr. Speaker, what I'd like to say is something to the representative from Duval County. I was one of the leaders fighting

for Mayo Clinic to come to Duval County which means more to Duval County than anything else that I know of. I did it because I thought it was right. Some of my people in my county, Shands and all the rest, didn't like it. But I did it because Duval County needed jobs and they needed medicine.

Mr. King is one of the greatest orators I've ever seen in not telling all the facts. Nothing from nothing is still zero, and when you take the tax at Polk County today, several years ago, we said that anyplace in the State of Florida would make certain types of alcohol, they would be exempt. That was to help Florida (p.62) industry.

Now, when I was growing up in Hawthorne we used to take the cane skimmings and pulp and make some of the finest things you've ever drank. It was old buck and it was completely tax free because the sheriff couldn't catch it. But you're not losing any money when you're not taxing and letting it go.

For the last four or five years we knew what we was [sic] doing, we didn't put that money in the budget, we know what we doing now [sic]. So I say to my friend, Representative King, look at your insurance industry that all of us helped vote in and look at Mayo Clinic which we all held our nose but Duval County needed it.

SPEAKER: Representative Meffert.

MEFFERT: Mr. Speaker, members of the House, you know, they get all this debate. I got an excellent bill here, but the great thing about chairing Regulated Industries is they come to you and say "I got a little amendment." All they're talking about is one amendment. Let me tell you, there is -- this (p.63) thing is an important bill, as Mr. Mitchell's viticulture bill is, it has simplified those people that are in this business with their delivery vehicles, it deals with reforming and simplification of the quota licensing process. There are many issues in this bill. It includes the territorial part of the beer franchise bill that was not passed

earlier in the session.

This is a good bill. There are situations, the beverage license for certain condominiums that I know many in Dade are interested in, and this amendment is another issue like many that come up here. Mr. King and the Duval delegation I'm sure, how many articles did your paper write against the premium tax for domestic insurers, Mr. King, how many will we see before next session, to not treat domestic insurers that are domiciled in Florida differently from other insurance companies. It's no different from anything else we've done and the consideration is good, the figures that have been bounced about about the possible fiscal impact have been improved, largely saved. We believe that our (p.64) chances of risk are negligible in the courts with the work that Mr. Simon and others did on the savings clause amendment. So I submit to you the bill is an excellent one. We accepted an amendment to it. That's part of the process.

There is nothing wrong in the world with supporting this bill and with that, I would urge your favorable consideration.

SPEAKER: So question occurs on the final passage of Senate Bill 1326. The clerk will unlock the machine and the members will proceed to vote. The clerk will lock the machine and announce the vote.

CLERK: 103 yeas, 12 nays, Mr. Speaker.

SPEAKER: So the bill passes.

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(p.65)

EXCERPT FROM SENATE, FINANCE, TAX
AND CLAIMS COMMITTEE HEARING

May 19, 1988

(Amendments to CS/SB 1326
are being offered and discussed)

(p.66)

CHAIRMAN: Now, we have one more, I believe.

SENATOR JENNINGS: Yes. This is the alcoholic beverage bill, we call it, dealing --

CHAIRMAN: Where is it?

SENATOR JENNINGS: -- pretty much---

CHAIRMAN: Okay, that's tab 21. That's 1326.

SENATOR JENNINGS: The major provisions of the bill are concerned with enhancing the Department of Business Regulation's ability to regulate and enforce the alcoholic beverage code. Included are things, for example, that permit a person to know whether he or she qualifies for the license before they have to go through all of the financial cost of getting the license, because there are some people who are not going to qualify no matter what.

Technical things, for example, requiring the license to be operational for at least eight hours a day for seven months out of the year so that people don't just warehouse licenses, clarifying the Department's authority concerning the warrantless searches of (p.67) vehicles used to transport alcoholic beverages. Expands the definition

of the word "sold" and reduces administrative costs. Sounds like motherhood and apple pie. Oh, and allows your beer cans to have "Florida" stamped on the top instead of the bottom.

CHAIRMAN: Oh, here he is. Okay. We have Senator Crawford with us who has some amendments.

SENATOR JENNINGS: That's what he thinks. Crawford, what have -- Can we recall his bill back to my committee?

CHAIRMAN: Okay, everyone has the amendments?

SENATOR JENNINGS: Are those all his amendments?

CHAIRMAN: Well, there are only eight.

SENATOR CRAWFORD: It's eight.

CHAIRMAN: Okay, the first amendment by Senator Crawford is on page 1, line 11, insert a lengthy amendment.

SENATOR CRAWFORD: Okay, yeah, this is not the major amendment. This has to do with hotels who have, if you have 100 rooms or more you are entitled to a liquor license. If you (p.68) change the status of them to condominiums but you still rent them out as hotel rooms but now you are not specifically under the definition of a hotel, you would lose that and I think what this amendment does is says that you can still keep, you don't lose the license because of that.

SENATOR JENNINGS: I am unaware of all of these amendments, so we will have to work backwards. Can we get an example of something like that?

CRAWFORD: Anybody here has an example?

SENATOR JENNINGS: And a live body, tell me who that helps.

UNIDENTIFIED SPEAKER: (Unintelligible.)

SENATOR CRAWFORD: Right.

SENATOR JENNINGS: But still keeps a restaurant?

UNIDENTIFIED SPEAKER: (Unintelligible.)

SENATOR CRAWFORD: Right. But you still have to have at least 51 per cent of them as guest rooms just like it's a hotel so it's still a hotel. Just under the technical definition of a hotel that it is no longer a hotel, so this would say if you still have (p.69) 51 percent of the rooms in the pool, then you could still keep your restaurant, your liquor license there.

SENATOR JENNINGS: Well, since those who are most interested in it didn't see fit to chat about this with me, I have no idea what this bill does, nor does my staff. So --

SENATOR CRAWFORD: This one came to me late yesterday also.

SENATOR JENNINGS: Senator Crawford, would you like to tell us whose bill this is, I mean whose amendment it is. We are aware of some problems with things, I'm not necessarily aware of a problem with this. So we may have no opposition to it. I just don't know anything about it.

SENATOR CRAWFORD: Senator Margolis asked me to do this yesterday afternoon. I said it sounded all right, so that's where it came from. She's down in, I guess, Appropriations.

CHAIRMAN: Doesn't this go to Appropriations when it leaves here?

SENATOR JENNINGS: Yes, and, you know, it's the will of the Committee, as I said, I don't have any idea what it does or who it (p.70) does it to.

SENATOR CRAWFORD: Well, if this goes through, maybe I can have Gwen offer it there, if that's --

SENATOR JENNINGS: I would appreciate that opportunity for the staff to look at it, since this is a fairly extensive bill that we're dealing with.

SENATOR CRAWFORD: Right, that is correct. Okay.

CHAIRMAN: Okay. Are you withdrawing the amendment?

SENATOR CRAWFORD: I withdraw the amendment.

CHAIRMAN: Okay, we'll go to --

Okay, the second one is a title? Okay, we have by Senator Kiser, on page 10, between line 7 and 8, insert a lengthy amendment.

SENATOR KISER: (Unintelligible.)

SENATOR JENNINGS: Only for malt beverages. So this is an exclusive territorial agreement for the beer people. Again, it has not been discussed with me.

CHAIRMAN: No one mentioned it to you?

SENATOR JENNINGS: Tomorrow's another (p.71) day. It's whatever you all ---

SENATOR KISER: (Unintelligible.)

SENATOR JENNINGS: Well, as I said, Mr. Gridly said he tried, I'm not aware of him coming to see me, but, since I handle all these, I'm surprised that this is where they come. I know there is a disagreement about this within the industry.

We may be in a posture, members of the Committee, and I don't mean to put you into this. Liquor bills in the House have been essentially killed, because of a number of perhaps these very same amendments being offered or going on one and then they turned around and killed the bills back and forth. You know, it's the will of the Committee, but my staff that handles this and I am unaware of all these amendments. So, that Committee that deals with this every day has not had the privilege of looking at it and I don't appreciate that.

UNIDENTIFIED SPEAKER: (Unintelligible)

CHAIRMAN: Have you seen any of these amendments?

SENATOR JENNINGS: None.

(p.72)

STAFF DIRECTOR: Number 7 she may have seen.

CHAIRMAN: Okay, you didn't see 7? The staff director informs me that you might have that waved in front of you there.

SENATOR JENNINGS: Is that the import licenses, as a result of the Supreme Court decision? I'm aware of it and if we bring it up, we'll probably have about half of this crowd for it and half of it against it.

CHAIRMAN: Is that the one about the local, about people, domestics getting a little bit of help?

SENATOR CRAWFORD: Yeah, listen. I'd like to bring that. I talked to Senator (p.73) Jennings about that. I don't think that half of this crowd is going to be against that.

CHAIRMAN: I don't either.

SENATOR CRAWFORD: We'll see who our friends are out there.

CHAIRMAN: Amendment 7 on page 10 between lines 7 and 8, insert a lengthy amendment. Senator Crawford, explain.

SENATOR CRAWFORD: Thank you, Mr. Chairman. I mentioned this to Senator Jennings on the floor, I think, before and I hope that everybody got her the language.

What this bill does, for the last 27 years there has been an incentive that the State of Florida has had for companies to use certain agriculture products and for distilleries in Florida. As a result of that, we have about 300 jobs in Polk County that were produced by that tax incentive. A few years ago we had trouble in the courts with that incentive and so we rewrote it, had a big discussion about it, came back, thought we had it worked out with the courts, went back into the courts again. Supreme Court struck it, after actually we had come here to session so it kind of got thrown on us right in the middle of the session.

At the same time, the State of Georgia had another differential tax and they had the same problem as we did. So they actually had their tax challenged, it was upheld, and I think cert was denied to the Supreme Court so we think we have now the right way of delivering this tax and this bill would then rewrite that tax so that (p.74) distilleries in Florida do have a small preference over out-of-state and this is an attempt to make that law constitutional.

SENATOR JENNINGS: Mr. Chairman, the Department is here. This has a negative revenue impact. I think perhaps they should address the issue.

CHAIRMAN: Well, they don't have a card up here and I don't see them standing up. This guy is not exactly rushing to the forefront.

SENATOR JENNINGS: Mr. Chairman, this is what you call a command performance. They'll stand up in a minute here.

SENATOR CRAWFORD: As he's coming up here, let me say, I met with Secretary Poole before we came in here today and I think that--I didn't find any opposition from the Secretary. I'm not sure what his--some of the times I don't know what the troops are doing here.

CHAIRMAN: Yes, sir, could you state your name and your position, and please fill out a card and bring it up here when you're through.

(p.75)

MR. COCHRAN: Yes, I'm John Cochran. I'm the Budget Officer of the Department of Business Regulation. As a part of my duties with the Department, I make revenue projections. We've been asked to look at the possible revenue impacts of this particular amendment on this date.

We looked at it from a standpoint first assuming constitutionality of the amendment. Based upon that, the impact would be about $3.4 million to the State out of general revenue. That does not compare unfavorably with the current law which was stricken recently by Supreme Court. It's about the same amount of money assuming constitutionality.

If the bill is not unconstitutional, even though I understand that there is a reverse severability clause in there, it does put a good bit of the state revenue at risk. It puts revenue at risk because it lowers the base on the beverage tax. By lowering the base, then the difference between the current base and the old base is about, excuse me, the difference in the base that's considered in the amendment and the current base is (p.76) about $111 million per year so if the additional

import tax was stricken down, there would be this difference between the base.

CHAIRMAN: Just a question. I know on the insurance, the domestics vs. the out-of-state, when something is struck down they usually don't go back, unless you've shown ill will and the ruling has been and so there really wouldn't be any loss. You'd just have to change your law as soon as the ruling would come out or within a period. Isn't that correct?

MR. COCHRAN: Yes, sir, that could be correct. As I understand---

CHAIRMAN: I want everybody to be clear on that and to know exactly what the norm is.

MR. COCHRAN: As I understand, it would be up to the courts. Twice before the courts have addressed this situation, twice they found it unconstitutional and in each case they did not require the state to make refunds. They may in this particular case, because in this particular case it's the (p.77) difference that the base has been changed.

CHAIRMAN: So, generally speaking, they don't force you to refund. As long as you're moving forward and showing intent to correct what is perceived to be a constitutional problem. Okay.

Is there any further questions of our testifier? Thank you very much.

Is there anyone else that wishes to speak to the amendment?

SENATOR JENNINGS: Mr. Chairman and Senator Crawford, this issue was taken up and discussed prior to the bill actually being brought before the Committee and it was our determination, you know, we had a concern based on the Department, but obviously the will of the Committee prevails.

CHAIRMAN: Okay. Is there any further discussion on the amendment? Okay, is there any objection to the amendment? Show the amendment passing unanimously without objection.

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(p.78)

EXCERPT FROM SENATE APPROPRIATIONS COMMITTEE
HEARING
MAY 27, 1988

(CS/SB 1326, including Senator Crawford's amendment relating to excise and import taxes, is being discussed. The following is the only discussion related to the excise and import taxes.)

(p.79)

CHAIRMAN: We are going to go back to Senate Bill 1326 that we temporarily passed. Senator Jennings' Commerce Committee Bill.

Are you ready, Senator?

SENATOR JENNINGS: As ready as I'll ever be. Is this the liquor bill? 1326?

CHAIRMAN: Right, we're all going to need some.

SENATOR JENNINGS: Okay. If I get this one handled real fast, can I have my other two at the same time?

Mr. Chairman, Senators, the alcoholic beverage bill you have before us in essence is some technical amendments to the Department's statutes that they have to abide by dealing with quota drawings and

how long the establishment must be open to qualify for the license and what happens if the person holding the license has a debilitating illness and very technical things. There is one amendment that's with it that came from Finance and Tax that deals with--

CHAIRMAN: Page 175, excuse me, Senator, in the green book.

SENATOR JENNINGS: --that deals with a (p.80) constitutional issue of favored status on imports that use Florida products, like citrus or sugarcane or, I don't know, leftover palm tree or something like that.

CHAIRMAN: Elderberry.

SENATOR JENNINGS: Elderberry. Senator Margolis has a couple of amendments that I will be glad to take up. Then there's one that we're not too pleased with.

CHAIRMAN: Okay, Senator Margolis.

SENATOR MARGOLIS: There are three technical amendments.

CHAIRMAN: We are calling these "amendments to the amendment."

SENATOR JENNINGS: Well, Mr. Chairman, the amendment from Finance and Tax, it was not enrolled into another committee sub so they are amending the Finance and Tax amendment that is traveling with the bill and these are---

CHAIRMAN: Okay. Amendment to amendment No. 1, page 2, line 5, insert after the word wine "and malt beverages."

SENATOR MARGOLIS: Senator, all three of these amendments are technical amendments (p.81) to---people reviewed the amendments and Senator Crawford requested that I submit them. He's sitting here.

SENATOR JENNINGS: Yes. Senator Crawford is our troublemaker today.

CHAIRMAN: I appreciate that.

SENATOR JENNINGS: Members of the Committee, just so you know, these are technical to the amendment, but amendment No. 1 deals with the favored status on imported goods that use Florida products and it is a constitutional issue. We are adding an amendment that we hope will perfect something, but should this be struck down by the courts again, this could cost us in the neighborhood of $110 million.

I knew that would get your attention.

CHAIRMAN: Three technical amendments (unintelligible).

Another amendment to amendment No. 1 which inserts the statement that in the event a court determines this to be unconstitutional that the amendments are added here.

SENATOR JENNINGS: Aren't here and we (p.82) don't lose $110 million.

CHAIRMAN: (Unintelligible). I forget the name. What's that called? That clause? Severability.

SENATOR JENNINGS: Severability.

CHAIRMAN: Severability. All right.

SENATOR JENNINGS: Senator Margolis probably has another one.

SENATOR MARGOLIS: I have one amendment that doesn't go to the amendment, it goes to the body of the bill.

SENATOR JENNINGS: Yes.

SENATOR MARGOLIS: And it deals with liquor licenses in hotels that have converted to condominiums and since they're not, as long as the hotel rooms or 50 condominiums are used as hotel rooms, the condominiums are used as hotel rooms, they can retain their liquor license.

CHAIRMAN: All right. That is proposed, Committee, proposed amendment A that's offered by Senator Margolis, condominium guests. Any questions on that amendment? Any objections? Show the amendment adopted.

SENATOR JENNINGS: It does--- Senator (p.83) Langley, were you concerned about this? It's all right. The Department has looked at it. We have a situation where they want--for selling of alcoholic beverages, we're defining arena the same as a civic center so that they have to meet certain things. And there is another provision that--we have some conversions in South Florida of former hotels that had restaurants. They're not condos, but the restaurants are still there, and we don't want them to lose their liquor license because they are still operating as restaurants. The Department has looked at them and they agree that we need to do it by law. They can't just adopt a rule for it.

CHAIRMAN: Okay, Senator (unintelligible) amendment to amendment one by Senator Jennings.

SENATOR JENNINGS: Okay. We're going to withdraw those. That just takes out everything that we just put in.

CHAIRMAN: You don't need that.

SENATOR JENNINGS: Not yet.

CHAIRMAN: Title amendment, if we need these title amendments (unintelligible).(p.84) All right.

SENATOR JENNINGS: Okay, I think Senator Kirkpatrick has an amendment.

CHAIRMAN: Now, if the intent --- If it's a Committee substitute we need to adopt the Senate tax amendment.

SENATOR JENNINGS: Okay, well, let's go ahead and ---

CHAIRMAN: Without objection as amended we will adopt the Finance and Tax Amendment. And now we have an amendment by Senator Kirkpatrick.

SENATOR KIRKPATRICK: Which one do you want first?

CHAIRMAN: Okay, on page 10, line 8, strike all said lines and insert lengthy amendment. Mr. Kirkpatrick?

SENATOR KIRKPATRICK: Yes, Mr. Chairman. This basically is the territory amendment, and all it says that if you give somebody an exclusive territory and franchise or give the franchise an exclusive territory, then we're going to protect that exclusive territory, and I just have a couple of reasons why I think this is real important.(p.85) Basically, I think that the small business people in this state that sell beer need to be protected in their opportunity to have access to distribution of the product at a fair price. That needs to be protected, and I think that if we don't have this, we'll wind up with a situation where distributors can come into another distributor's territory and he can cherry pick out the high volume outfits.

You can cut a deal with the national headquarters or the state headquarters or some corporation and handle it and wherever you go and eventually the small guy gets left with no real access to it, and I think it initially might make the price a little more competitive but in the long run these other folks will go out of business and you'll wind up

with just one person controlling all of the sales, which I think will be detrimental.

CHAIRMAN: Senators, we have to speed this up. Senators, if nobody calls point of order we will go overtime and try to get to some of these bills ---

SENATOR KIRKPATRICK: I just want it voted up.

(p.86)

CHAIRMAN: Buddy Grisby, do you want to say anything? Are you against it or for it?

GRISBY: I'm for it. (Unintelligible).

SENATOR JENNINGS: Mr. Chairman, I respectfully oppose the amendment and I would ask that the Committee oppose the amendment. This is a separate kind of issue, as I mentioned. This Department bill has suddenly become the alcoholic beverage train which from time to time we find, but this particular amendment is going to cause us a whole lot of trouble at some future juncture, and I would ask that you oppose it.

CHAIRMAN: Okay, if you favor the amendment, say aye.

GROUP: Aye.

CHAIRMAN: Opposed?

SENATOR JENNINGS: No.

CHAIRMAN: Amendment passes. Title amendment without objection. Okay. Senator Jennings moves the bill with the amendment, all in favor, say aye.

GROUP: Aye.

CHAIRMAN: Opposed. So the bill is reported favorably.

(p.87)

EXCERPT FROM SENATE SESSION
June 3, 1988

(CS/SB 1326 including Senator Crawford's amendment relating to excise and import taxes is being considered by the Senate. The following is the only discussion related to the excise and import taxes.)

(p.88)

PRESIDENT: Now, is there further discussion on the bill? If not, Senator Jennings moves that Committee Substitute for Senate Bill 1326 be read a third time by title only and placed on final passage. Show the motion adopted without objection. Read the bill.

CLERK: Committee Substitute for Senate Bill 1326, a bill to be entitled an act relating to the Beverage Law.

PRESIDENT: Any questions?

SENATOR JENNINGS: Mr. President, just so that the Senate doesn't think we're trying to pull anything over on them, the first Finance and Tax Amendment was a rewrite dealing with the use of Florida products in export goods in wine and spirits and it is somewhat controversial.

I don't want anyone to think that we ran it through here without them knowing about it. There has been a lot of discussion. I don't hear any comments on the floor, but I don't want it to ever be said that I didn't tell you.

PRESIDENT: Any questions? If not, (p.89) the Clerk will unlock the machine and the Senators will vote on the final passage of Committee Substitute for Senate Bill 1326. Have all Senators voted? The Clerk will lock the machine and announce the vote.

CLERK: 30 yeas, 3 nays, Mr. President.

PRESIDENT: So the bill passes.

(p. 90)

EXCERPT FROM SENATE SESSION
June 7, 1988

(Senate is voting upon CS/SB 1326 as amended and approved by the House of Representatives.)

(p.91)

PRESIDENT: Okay, Senator Barron.

SENATOR BARRON: Message from the House. 1326.

PRESIDENT: Okay, read the first message from the House.

CLERK: Mr. President, I am directed to inform the Senate that the House of Representatives has passed with amendments Committee Substitute for Senate Bill 1326 and request the concurrence of the Senate.

SENATOR JENNINGS: Mr. President and Senators, is this the alcoholic beverage bill?

PRESIDENT: Senator Jennings.

SENATOR JENNINGS: There are a whole bunch of amendments and I move we concur in all of them. They're awful, but we concur.

PRESIDENT: Any questions of Senator Jennings on the ---

SENATOR JENNINGS: This is the alcoholic beverage bill that we sent down. There are a number of amendments dealing with the Jacquin issue. There are a number of amendments dealing with the exclusive territorial franchise for beer. There is also an amendment to delete the tax on imported beer. There is (p.92) an amendment dealing with cigarettes. There are lot [sic] of just real juicy things. But it is a bill that is of great concern to Senator Crawford, and so I move you say that we concur in all the House amendments.

PRESIDENT: Any questions on the amendments? Any objections? No objections. Show the Senate does concur in the House amendments and the question recurs on the final passage. Committee Substitute Senate Bill 1326. Clerk will unlock the machine and Senators proceed to vote. Lock the machine and announce the vote.

CLERK: 26 yeas, 3 nays, Mr. President.

PRESIDENT: So the bill passes.

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IN THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2881

(Caption omitted in printing)

FINAL JUDGMENT

This matter having come on for trial to the Court, without jury, on November 29, 1988 and the Court having heard the evidence and the arguments of counsel and being duly advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED:

1. For the reasons set forth in the transcript of proceedings on November 29, 1988, attached hereto and incorporated by reference herein, the provisions of Section 10(1) of Chapter 88-308, Laws of Florida, amending §564.06, Florida Statutes; and the provisions of Section 11(1) of Chapter 88-308, Laws of Florida, amending §565.12, Florida Statutes, are hereby declared to be in contravention of Article I, Section 8, clause 3 of the Constitution of the United States (the Commerce Clause) and to be therefore null, void, and of no effect.

2. This judgment shall operate prospectively from the date of rendition.

DONE AND ORDERED at Tallahassee, Leon County, Florida this 30th day of November, 1988.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies to all counsel of record

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

GENERAL JURISDICTION NO. 88-2881

(Caption omitted in printing)

EXCERPT OF PROCEEDINGS - RULING OF THE COURT

The above-entitled matter came on to be heard before the Honorable CHARLES E. MINER, Circuit Judge, Leon County Courthouse, Tallahassee, Florida, on the 29th day of November, 1988, commencing at 1:30 p.m.

Reported by:

JERRY L. ROTRUCK

Certificate of Merit

APPEARANCES

JAMES L. ARMSTRONG, SAMUEL C. ULLMAN, BETH ANN O'NEILL, JANE McMILLAN, and WILLIAM GOLDEN, Attorneys at Law, of the law firm Kelley, Drye and Warren, including Smathers & Thompson, 2400 Miami Center, 100 Chopin Plaza, Miami, Florida 33131; appeared on behalf of the Plaintiffs.

DANIEL C. BROWN and J. C. O'STEEN, Assistant Attorneys General, State of Florida Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; appeared on behalf of the Defendants.

MARGUERITE DAVIS, GARY RUTLEDGE AND PAUL R. EZATOFF, JR. Attorneys at Law, of the law firm Katz, Kutter, Haigler, Alderman, Eaton & Davis, 800 Barnett Bank Building, 315 South Calhoun Street, Tallahassee, Florida 32301; and

BRUCE G. ROGOW, Attorney at Law, 2097 Southwest 27th Terrace, Fort Lauderdale, Florida 33312; appeared on behalf of the Intervenors Jacquin and Todd[sic] Hunter.

JENNIFER PARKER LaVIA, Attorney at Law, of the law firm Parker, Skelding, McVoy & Labasky, 318 North Monroe Street, Tallahassee, Florida 32301; appeared on behalf of the Intervenors California Wine Institute and Tampa Wholesale Liquors.

APPEARANCES (continued)

THOMAS F. CONNELL, Attorney at Law, of the law firm Wilmer, Cutler & Pickering, 2445 M Street, N.W., Washington D.C. 20037-1420, appeared on behalf of the Intervenor California Wine Institute.

ALSO APPEARING:

STEVEN NACLERIO, Senior Vice President, Bacardi Imports, Inc., 2100 Biscayne Boulevard, Miami, Florida 33137.

(p.1)

EXCERPT OF PROCEEDINGS

THE COURT: This case is not going to turn on any answers, any questions asked in deposition or any answers to those questions.

I am going to rule at this time. I have carefully considered this matter, I have read all of the matters that you have submitted to me. I don't think there is any question in my, well, there is no question in my mind in a constitutional sense that this statute is but a warmed-over version, dressed up in different clothing perhaps, of that which has previously been, at least on one occasion, struck down as violative of the commerce clause. I think that the same thing is true.

Now, I do not find that legitimate 21st Amendment concerns of the State of Florida as expressed in the purposes paragraph justify in a constitutional sense overriding the commerce clause. I think that no matter what it is called, I think we have got to look, and that is why we built a record in this case, I think we have got to call it like it is. The State has not justified this statute, justified this cost differential which I believe to be clearly discriminatory on 21st Amendment concerns.

The State, number one, has never even, how could (p.2) it, for instance, I might look at it, at this case a good deal differently if the State did have an inspection program, quality control to protect its citizens. The State didn't have any quality control program as that, they never have prior to now. They do not now inspect any property upon which grain or other vegetables are grown that are used in the distilling process. I think that all of that is just illusory.

I impute and suggest no bad motives to anybody, on the Legislature or any other branch of government, but just simply can't see the 21st Amendment purposes that would save that which is so clearly discriminatory.

Now, I am going to look with great interest and follow with great interest the Supreme Court granting certiorari in the two Connecticut cases, but I just think this is a bit more of the same. I think this is, for, however well intentioned, and I impute, again, to Senator Crawford and other members of the Legislature who passed this bill, no base motives.

I simply suggest that they drew and drew some comfort out of a Georgia statute, I don't know how hotly contested it was, how it was advocated and how it was lawyered, but I suspect that the purposes section of the statute here in question is drawn directly from the purposes section in the Georgia statute, which the Georgia (p.3) Supreme Court found to be constitutional.

I don't know how hard the matters there were argue [sic] and how detailed the court analysis was there, but as far as I am concerned, the Legislature still has yet to succeed in, as one of their purposes, giving some relief to some of our Florida growers, Florida distillers. I think that is simply what this is, pure and simple, and that is going to be my ruling in the matter, and I announce it from the bench solely for the purpose of letting you go forward to whatever court you care to hear this.

I do it, again, because I am not going to have time to write any lengthy opinion expressing my views and I knew that at the time that I asked you to build a record. You have built a record, and now the matter will have to go forward to one of the appellate courts, but I do find that the statute is violative of the commerce clause of the Constitution of the United States.

Now, with respect to prospective or retrospective application, I am going to stay with the position that [sic] have taken, briefly, and I am going to find that my ruling is going to be prospective in its application and not retrospective, that is to say, all monies collected and I am not going to order their return.

(p.4)

McKesson also involved the question of prospectivity and retrospectivity, did it not?

MR. BROWN: I am sorry, Your Honor?

THE COURT: McKesson, the Crown, one of those cases involved --

MR. BROWN: Yes, sir.

MR. ARMSTRONG: Yes, it did, Your Honor.

THE COURT: It was McKesson, too.

MR. BROWN: Both of them, actually.

THE COURT: Both of them did, and I have ruled that in that case that there should only be prospective application, and the Supreme Court at least has agreed with me.

Now, the United States Supreme Court, I am told, has granted cert on the matter, but I am going to find that there will be no taxes refunded, and let me give you my primary reason for that.

By now, all of the persons who have had to pay this tax have passed that tax on to the consumers. I don't think there is any out-of-pocket expense to anybody, so the people of Florida have paid it back, and if you can show me some way to get it back from those citizens or to pay them, and if I take this money and make it -- require the State to refund it, if you will refund it to the people who bought it, I will do it, but I am not (p.5) going to put it back in the coffers of the companies that paid it.

Therefore, my ruling is prospective only in its application, it is not retrospective.

The statute I find to be unconstitutional as violative of the commerce clause, and I find that the 21st Amendment arguments are not available, I do not find any 21st amendment justification provided in the commerce clause.

That is it, ladies and gentlemen. I want to thank everybody. I know that I put you through a rather tough time schedule, and I did it not because I had any knowledge of where I would be -- that I was going to be leaving this court, but because I was going on the criminal bench and would not be able to hear it, this is the only time I could hear it, and I want to thank everybody, Mr. Armstrong, you and your associates, and certainly Dan Brown who I will have to observe is one of the best lawyers, he is certainly one of the most persistent ones that I have run into in the time that I have been on the circuit bench, and it is great as always to see my esteemed friend, Bruce Rogow. One of these days I am going to agree with Bruce on something and it also going(sic) to either surprise me to death or him to death.

MR. ROGOW: Maybe in the DCA, Judge.

MR. ARMSTRONG: Your Honor, should we prepare and submit an order?

THE COURT: You can prepare a short order and I want it short, it need not be more than a page in length, and read it to Mr. Brown --

MR. ARMSTRONG: Yes, sir.

THE COURT: --before you submit it to me. Get it to me within the next three or four days because I will not be in my office after the 4th or 5th.

MR. ARMSTRONG: Do I understand, then, that the Division should be governed accordingly, Your Honor, by the ruling as of today?

THE COURT: That is correct, that statute is unconstitutional as we speak. Yes, Dan?

MR. BROWN: Your Honor, if I might suggest, technically, if that is to be the Court's ruling, what we ought to do is transcribe the Court's findings and file with the Court your order so that tomorrow morning this could be rendered as the effective date.

THE COURT: You speak with the court reporter about that .

All right , citizens, thank you.

MR. ARMSTRONG: Your Honor, we have some things we would like to get in, I think we can get them taken care (p.6) of in your absence, memoranda and things of that sort. I know Your Honor is tired and you don't want to --

THE COURT: Yes.

MR. ARMSTRONG: We have some things to complete the record that we would like.

THE COURT: You can complete the record but make certain you complete it with everybody's acknowledgement that is part of the record.

MR. ARMSTRONG: Thank you, Your Honor.

THE COURT: I don't want to leave this file here, but we must do something to protect this file. I am

going to let you take care of it. I trust you implicitly.

MS. DAVIS: Thank you.

(Whereupon, the proceedings were concluded at 7:40 p.m.)

(Reporter's certificate omitted in printing)

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 88-2881
FL BAR NO: 0191049

(Caption omitted in printing)

JOINT NOTICE OF APPEAL

NOTICE IS GIVEN that C. LEONARD IVEY, Defendant, Appellant, in his official capacity as Director of the Division of Alcoholic Beverages and Tobacco of the State of Florida, Department of Business Regulation, JACQUIN-FLORIDA DISTILLING CO., INC., and TODHUNTER INTERNATIONAL, INC., Defendants, Appellants, appeal to the First District Court of Appeals, the Order of

this Court rendered December 1, 1988. The nature of the order is a final order granting injunctive relief.

s/s Daniel C. Brown
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Department of Legal Affairs
Tax Section
The Capitol
Tallahassee, Florida 32399-0150
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s/s Marguerite H. Davis
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